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BY

BRUCE WYMAN, A.M., LL.B.

PROFESSOR OF LAW IN HARVARD UNIVERSITY AND
LECTURER IN THE DEPARTMENT OF ECONOMICS

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PREFACE

I HAVE been advocating for many years the regulation of the trusts by law, rather than the persistence in the attempt to destroy by law these aggregations of capital. For I have come to believe in the control by the State of all businesses which have outgrown the regulation of competition. I do not mean by this that the State should undertake to order the conduct of all businesses, which it is apparent would be one form of socialism. Regulation of this extreme sort will be confined to those businesses which are affected with a public interest. But it seems certain that other businesses than those now within this classification will eventually be brought within it. And the thesis will be defended in these pages that all businesses which have a virtual monopoly, firmly established in the nature of things, are so affected with a public interest as to be within the class of callings which are considered public employments. What branches of industry will

eventually be considered of such public importance as to be included within the category of public callings, it would be rash to predict. But no one can study the authorities on this subject without feeling their great potentialities. In private businesses, one may sell or not as one pleases, manufacture what qualities one chooses, demand any price that can be gotten, and give any rebates that are advantageous. It is because the modern trusts are carrying on a predatory competition under the cover of this law that we have the trust problem. All this time in public businesses one must serve all that apply without exclusive conditions, provide adequate facilities to meet all the demands of the consumer, exact only reasonable charges for the services that are rendered, and between customers under similar circumstances make no discriminations. If this law might be enforced against the trusts, perhaps a solution of the problem would be found. The immediate extension of this coercive law of public employment to cover the industrial trusts, I have been urging incidentally in various writings for some time. And it is fitting that I should acknowledge in this place the courtesy of the Boston Book Co., in

permitting me to reprint certain articles of mine in the *Green Bag,* and the kindness of Baker, Voorhis & Co., in allowing me to take what I pleased from my recent treatise on *Public Service Corporations.*

B. W.

CHAPTER I

TENDENCIES TOWARD STATE CONTROL

I

It has been remarked many times that our common law, by which we are so largely governed, may be relied upon to meet, by the continual development of its fundamental principles, the complex conditions created by the constant evolution in the industrial organization. This continual development in the common law is largely the result of the progressive changes in public opinion. The mere talk of the day has little effect upon the making of the law; for the law, as established, has too much inertia to be thus moved. But the seasoned opinion of a given era soon becomes the law of that period; for the judges usually have the same general ideas as other enlightened persons. Not only are they inspired with the same beliefs, but they have the power to insist that other men shall act according to their notions of social justice. Whenever the mass of men firmly believe that

approximation to certain ideals is necessary for their salvation, these policies will almost always be found to have become fundamental principles of the law.

II

The underlying causes of most of the changes in the law are really economic. Men suffer from the conditions of the time; and they look to the law to save them from their fate. That men are prone to hope too much from changes in the law is clear; but it is none the less true that they generally appeal to it as to a higher power. The current belief in all times is that if almost all men could be compelled to act as the great majority think they ought, there would be as near an approximation to perfection at any given time as is possible in that period of human progress. This notion has been the real support of all governments which have had any permanence since society began; for no constituted authority lasts long which is not responsive to public opinion to some degree.

From the earliest times some restraint has been exercised over all lines of industry

which are of vital interest to the public. The establishment of the peace, the protection of the weak against the physical violence of the strong, is a fundamental function of government; but of equal importance and of almost equal antiquity is the protection of the common people against the greed and oppression of the powerful. This is what public opinion has always demanded of the state, that it shall protect equally against physical violence and against oppression that affects the means of living. We get as much protection from the law as the enlightened persons of a given time believe we ought to have from it—no more, no less.

The modern lawyer, who accepts unreservedly the evolutionary theory of the growth of the law, is as ready as those of the older time, who believed in the eternal principles of natural justice, to begin his investigation of a legal doctrine in the earliest reports of adjudicated cases. A view of the whole course of our law upon a particular subject is as necessary now for those who hope at most to predict what the law is likely to be as for those who once expected to discover what the law had always been from time immemorial. The eternal conflict be-

tween competition and combination is always bringing cases to the courts for decision. Thus we may know from age to age what were the policies which were currently believed in; and so we may predict, with more confidence, what the law will be in the future, knowing what its course has been in the past.

III

The irresistible advances of the modern competitive system gradually worked the destruction of the mediæval organization of industry. Great, however, as was this change from the old economic theory to the new, it was gradual, and it was never complete. There was a swing of the pendulum. General but not absolute restriction of freedom of trade was the policy of the Middle Ages; general freedom of trade with the restriction of certain exceptional occupations has become the policy of modern times. Generally speaking, a state of free competition has been for several centuries now considered to be for the best interests of society; and, therefore, in modern times almost every business has been opened to almost every man. But at all times in economic history, both restriction and free-

dom are to be found in the law, the proportion, however, changing greatly. In one epoch there is much legal limitation, with little freedom left; in another age there is almost universal competition, with some little regulation to be found. And the rule will generally hold true that the more the natural laws of competition regulate service and price, the less the State need interfere in these respects; but, conversely, when competition ceases to act efficiently, state control becomes necessary.

As a result of the economic evolution from mediæval times to the present day, there have come into being in the last generation a considerable number of employments which have gained, if not a legal monopoly, at any rate, as a result of circumstances, a virtual monopoly in matters of public necessity. The law is the only protection that the public can have in a situation such as this, where there is no competition among the sellers to operate in its favor. So much has our philosophy been permeated with the theory of *laissez faire,* which was but lately so prominent in the policy of our state, that the admission has been made with much hesitation that State control is ever necessary. But the modern

conclusion, after some bitter experience, is that freedom can be allowed only where conditions of virtual competition prevail; for where there is monopoly without stern restrictions, there is always great mischief.

It is almost a truism that the spirit of the age molds its law. Those who make the laws are members of the community and share its spirit. The age's ideal of right is their ideal, the method of thought about justice which is prevalent at the time is their method of thought, too; and it therefore follows that in working out legal problems, the lawmakers work along the lines prescribed by the spirit of the age in which they live. Nowhere is the influence of the spirit of the time on the common law more evident and more potent than in this question of the regulation of business dealings. When monopoly prevails, the people call upon the law to save them. When competition is the usual thing, people speak disparagingly of the law.

IV

While State regulation is the prevailing philosophy of the people at the beginning of the twentieth century, it must be borne in

mind that this has been the result of a gradual progress of thought, and that this progress has not affected all men equally. Now, as at all times, there are conservatives and radicals, the former as far behind the prevailing spirit of the time as the latter go beyond it. In every change of popular thought there have been those who have been unable to appreciate the change; and in every such change there have been those who are unable justly to estimate the true meaning of the change. We have, indeed, three general types of thought at every time: the conservatives, the moderates, and the radicals. Many persons still hold conservative views as to the application of the law regulating monopoly to modern conditions. They believe that the conductors of every business, however necessary to public welfare, should do whatever seems good in their own eyes. Others, thoroughly radical, believe that the State should take entire control of the whole situation. But, as usually happens, the moderates hold the balance of power with their policy of State regulation only in so far as it may be found to be necessary.

Undoubtedly, therefore, the spirit of our present age demands that the great business

enterprises shall be conducted in accordance with the requirements of society. The present programme of organized society is to see to it that those who have gained a substantial control of their market shall not be left free to exploit those who look to them to supply their needs. Men now see clearly that freedom of action may, even in the industrial world, work injuriously for the public, and it must then be restrained in the public interest. We have seen the results of unrestrained power; and we no longer wish those who have control of our destinies left free to do with us as they please. Liberty does not mean to men at the beginning of the twentieth century what it meant to men at the beginning of the nineteenth century.

No one can carefully study the authorities on this subject without feeling that we are just entering upon a great and important development of the common law. What branches of industry will eventually be of such public importance as to be included in the category of public concerns, and to what extent the control of the courts will be carried in the effort to solve, by law, the modern economic problems, it would be rash to predict. Enormous business combinations, vir-

tual monopolization of the necessaries of life, the strife of labor and capital, now the concern of the economist and the statesman, may prove susceptible of legal control through the doctrines of this special law. General doctrines have been established; and upon this successful working out depends, to a large extent, the future economic organization of the country. Only if the courts can adequately control the established monopolies in all contingencies may the business of these concerns be left in private hands.

CHAPTER II

FREEDOM FOR FAIR COMPETITION

I

In any consideration of industrial problems we are confronted by the long established condition of free competition, and the still unquestionable desire for its continued maintenance. Even in these present days of elimination of competition by combination, the public policy for free competition is asserted often as vehemently as ever. For the most of men still believe, and the most of judges with them, that by the natural processes of free competition men find their highest development. Of course, there are opposed to an absolutely free competition in fact the natural barriers which necessarily accompany an industrial organization. To such social limitations men may submit themselves, however unwillingly; but in modern times legal restriction to individual advancement would not be endured in ordinary businesses. The final justification of the in-

evitable losses, which free competition unfortunately involves, is to be found in this well founded opinion, that fundamental limitations upon free competition are not only wholly impractical, but wholly incompatible with individual liberty.

II

That this is all a matter of current opinion may be established by showing that other views were formerly expressed quite as confidently by the courts of law. In the mediæval system as we see it in our earliest law reports, restriction of competition was the prevalent doctrine. It was conceived that it was better both for producer and consumer to have a special position in the economic order assigned to every man. Each man had a right to his place in the established order according to his rank, with its corresponding duty. So long as this condition of affairs gave satisfaction to the most of men, it received the support of the most of courts.

These special rights in special businesses met one at every turn in mediæval trade and business. Almost all the crafts and

manufactures were parceled out by special franchises to various guilds and fraternities, each of which had exclusive right in its own field. So local trading and distant commerce were in the hands of the guilds merchant and trading companies, each with an extensive monopoly by its original constitution. The same arrangements ordered activities within the manor. The course of husbandry and the rotation of the crops were regulated by an established system. The incidental services, like those of baker, miller, farrier and butcher, were provided for by exclusive franchises. Markets and fairs were established for the sale of products and legally protected, so that none might barter his goods elsewhere during those periods. And, of course, hunting and fishing were preserved and reserved.

Times change, however, and the laws with them; when the doctrines of the Renaissance became current, men were no longer content with the older restrictions which so hampered the advancement of the individual. So far as one case can evidence it, the turning point in our law was the Schoolmasters' Case in 1410 (Y. B. 11 Hen. IV. 47, 21). The masters of a grammar school

of Gloucester brought a writ of trespass against another master, and counted that the defendant had started a school in the same town, so that whereas the plaintiffs had formerly received 40d. a quarter from each child, now they only got 12d. to their damage. The counsel for plaintiffs contended that this interference shown and this damage proved made a good action on the case; he cited many instances of exclusive rights, including the claim of the masters of Paul's that there should be no other masters in all London except themselves. But Justice Hill said that there was no ground to maintain this action, since the plaintiffs had no estate, but a ministry for the time; and though another equally competent with the plaintiffs came to teach the children, " this was a virtuous and charitable thing, and an ease to the people, for which he could not be punished by the law."

This was not accepted as good law without a struggle. A generation later in the case of the Prior of Nedeport (Y. B. 22 Hen. VI. 14 b) we have a long and heated argument between counsel and court over a writ claiming damages for the injury done to the business of the mill of the prior by the estab-

lishment of a mill by another party without authority. Finally Justice Newton disposed of the argument for the plaintiff by putting supposititious cases. He concluded with this: Let us suppose that there is a freeholder in a certain vill who is making large profits by using his lands for pasturing cattle, and then another turns his arable land into pastures, thereby getting from the inhabitants the agisting of many beasts, will there be a remedy for the first landowner? "Clearly not; for it is lawful for an owner to make the best profit he can from his land."

Not only did these cases establish for the future, beyond all doubt, that competition was to be free unless an exclusive franchise had been granted in explicit terms, but they declared, with the high hope of new enthusiasm, that free competition was altogether beneficial. After some centuries of experience, such indiscriminate praise, it may be, would not be given the competitive system. It has been found out that the competitive régime along with its good results has brought deplorable injustices, even to meritorious individuals. But there are few persons, notwithstanding this, who would assert that any

practicable method of ordering human affairs would produce better results.

III

And, indeed, this belief in free competition is so fundamental in modern opinion that the issue is hardly to be found in litigation in modern books. As a usual thing it is only incidentally that the question comes up, as in Allen *v.* Flood (1898 A. C. 1), where Lord James of Hereford supposes this case: An architect seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore, employ me and not A. or B." Can this rival sue? His Lordship says not, clearly: "Before discussing the question it is necessary that some definition of the words 'interfered with' in their legal sense should be given. Every man's business is liable to be 'interfered with' by the action of another, and yet no action lies for such interference. Competition represents 'interference,' and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly 'interfere with' it.

If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow."

Again, in Vegelahn *v.* Guntner (167 Mass. 92), Mr. Justice Holmes propounds by way of illustration the case of rival shopkeepers, a new man endeavoring to drive the old man out of business. The town, he supposes, is too small to support more than one, and the new man succeeds in getting all the business of his rival within a short time. Yet it is the necessary decision that no legal wrong is done: "The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. Yet even this proposition nowadays is disputed by a considerable body of persons, including many whose intelligence is not to be denied, little as we may agree with them. I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some

means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade."

IV

It is not altogether impossible to find cases where the decision turns upon the fact that what is complained of is nothing more than mere competition; for a judge will sometimes find it a convenient method of disposing of a case to reduce it thus to simplest terms. In Snowden *v.* Noah (Hopkins Ch. 351), for example, an injunction asked by the purchaser of a newspaper property to prevent the former editor, who had set up a new journal, from getting away his subscribers was refused, Chancellor Hopkins saying: "The business of printing and publishing newspapers, being equally free to all, the loss to one newspaper establishment, which may follow from the competition of any rival establishment, is merely a consequence of the freedom of this competition, and gives no claim to legal redress."

An interesting case, involving much the same point, was Ayer *v.* Rushton (7 Daly 9). The proprietors of Ayer's "Cherry

Pectoral" sought to enjoin Rushton & Co., an enterprising firm of druggists, who were compounding a "Cherry Pectoral" of their own. Conspicuously placed in the windows were placards with the words, "Ayer's Cherry Pectoral, one dollar—Rushton's Cherry Pectoral, fifty cents—Which will you have?" Rushton's clerks were carefully instructed to ask persons inquiring for Cherry Pectoral which they wanted, "Rushton's" or "Ayer's," and to say that "Rushton's" was much better, although they had both in stock. On this evidence the court, of course, could find nothing but fair competition, as every effort had been made to distinguish the preparations for the purpose of inducing customers to buy Rushton's Pectoral instead of Ayer's.

V

Another way in which the question comes up is when a person who has been damaged by the construction of the works for a competing business claims that he is one of the persons who should have compensation, reparation having been provided for in some general way. Thus in Hopkins *v.* Great Northern Railway (L. R. 2 Q. B. D. 224),

the proprietor of a ferry sued the railway company for damage caused to his business by the construction of the railway bridge across the river, which diverted travel from his ferry. Lord Justice Mellish held that the complainants were not entitled to anything: "If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways, or had a legal interest in the profits to be derived from the use of highways before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways: proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls, have all suffered great losses from the diversion of traffic to railways and have received no compensation. No doubt their rights have not been infringed, though their property has been affected."

There are several cases, also, where the grantees of a franchise have brought suit against those who are damaging their in-

terests by conducting a competing business in which the courts, upon the strictest construction of the franchise, have held that this particular kind of competition was not in violation of the franchise, and therefore have dismissed the suit, since nothing but mere competition remained as the basis of the complaint. Such were substantially the facts in Illinois and Michigan Canal *v.* Chicago and Rock Island Railroad (14 Ill. 314), where a canal company complained of the interference with its business by the construction of a railroad paralleling it. In discussing the case, Mr. Justice Caton said: "Who shall anticipate the new methods of intercommunication which the ingenuity of this wonderful age may devise, or the improvements which may be made in the old? Who can set bounds to the wants in this respect which new developments may suggest? And shall we imply and intend, even with the aid of the most liberal rule of construction, that the legislature designed to surrender the right to allow the people to avail themselves of improved modes of communication or commerce?"

VI

It would seem that the right to cut prices, whatever damage may result to competitors, is a fundamental privilege in competition. In the very important case of the Mogul Steamship Company *v.* McGregor (L. R. 23 Q. B. D. 598), one of the matters of which the tramp steamship owners complained was that the regular steamship companies sent additional ships to Hankow and smashed freights, in order to ruin them or drive them from the field. In holding that this constituted no legal wrong Lord Justice Bowen said: "It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates, provided they did not lower them beyond a 'fair freight,' whatever that may mean. But where is it established that there is any such restriction upon commerce? And what is to be the definition of a 'fair freight'? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the

ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future; and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary 'normal' standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go, and no further.' To attempt to limit English competition in this way would probably be as hopeless an endeavor as the experiment of King Canute."

Undoubtedly the excellent opinion just quoted represents the law everywhere. All that there is against it is an interesting dictum in Averrill *v.* Southern Railway (75 Fed. Rep. 736), where the receiver of a railway filed a bill asking the aid of the court in protecting the property against a rate war inaugurated by the Southern Railway. A cut of 35 per cent. had been made with notice that, if this was met, a further cut of 80 per cent. would be made in the rates. It was alleged that its ultimate object in this was to annihilate competition by the de-

struction of its competitors. How deplorable, in a public service, this seemed to Mr. Justice Simonton, may be seen from his extreme language: "The destructive results of a rate war waged between two great systems of railroads are recognized and deprecated by men of the greatest ability who have considered the subject. They impair and destroy the usefulness of the railroads themselves, and their ability to serve the public with certainty, efficiency, and safety. The business interests of the community which move the crops and bring supplies to the consumer require that rates be stable. Every precaution has been taken by state legislatures and by the congress to keep them just and reasonable,—just and reasonable for the public and for the carriers. A few favored points and a few persons may for a short time receive temporary advantage. But the result of such a war is the destruction of values, the disturbance and injury of all business interests, the demoralization and confusion of rates, and great public and private loss."

VII

The attempt in every modern case of this sort is, therefore, to show something more than mere competition—to show in the particular case there are special circumstances which bring the case outside the ordinary course of competition. A striking instance of this is the recent case of Passaic Print Works *v.* Ely & Walker Dry Goods Company (105 Fed. 163). These manufacturers of various brands of calicoes, which sold usually at fixed prices, complained of a circular sent out by these jobbers, wholly maliciously, so it was alleged, offering these prints at cut prices. This injured the manufacturers' trade; for no other jobber could sell "Central Park Shirtings" at 3½ cents per yard, the list price, while these jobbers were offering the same goods at 2⅞ cents. The majority of the court—Mr. Justice Thayer writing the opinion—decided against the complainants; the gist of his opinion being this: "The owner of property, real or personal, has an undoubted right to sell it and to offer it for sale at whatever price he deems proper, although the effect of such offer may be to depreciate the market value

of the commodity which he thus offers, and incidentally to occasion loss to third parties who have the same kind or species of property for sale."

It should be noted that the decision in this case goes to the extreme of making competition an absolute justification, regardless of circumstances. But in Tuttle *v.* Buck (107 Minn. 145) there is a late authority the other way. It was held in that case that a complaint stated a legal wrong which stated in substance, that the defendant, a banker and a man of wealth and influence in the community, maliciously established a barber shop, employed a barber to carry on the business, and used his personal influence to attract customers from the plaintiff's barber shop, not for the purpose of serving any legitimate purpose of his own, but for the sole purpose of maliciously injuring the plaintiff, whereby the plaintiff's business was ruined. The opinion of Mr. Justice Elliott shows real insight into the nature of the problem, as even the following extracts abundantly show. "It must be remembered that the common law is the result of growth and that its development has been determined by the social needs of the community which it

governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable; and this idea has found expression in the decisions of the courts, as well as in statutes. But it has led to grievous and manifold wrongs to individuals; and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent pur-

pose, he is guilty of a wanton wrong and an actionable tort."

VIII

According to the better opinion at the present time, as expressed in the writings of the many authorities who have turned their attention of late to the problem of the place of competition in the law, fair competition is considered as a matter of justification upon grounds of policy. The accepted theory is that every man engaged in business has a right *prima facie* to have his custom undisturbed; in this view a person who diverts trade from him commits a legal wrong *prima facie*. But if this trade is invaded in the course of fair competition there is a recognized justification; while there is no valid excuse in the case of unfair competition. The comparison of two cases may bring this out more clearly.

In Graham *v.* St. Charles Street Railway (47 La. Ann. 214) a foreman posted a notice to the effect that he would discharge employees who should continue to deal with Graham, a grocer. The court held that such unjustifiable interference with the grocer's business constituted an actionable

wrong, Chief Justice Nichols saying: "In so doing the defendants would not only control their own will, action, and conduct, but forcibly control and change, from pure motives of malice the choice and will of others, through fear of non-employment or discharge. This will and power of choice, both the plaintiff and the parties themselves are entitled to have left free, and not coerced in order to simply work the former damage and injury."

On the other hand, in Robinson *v.* Texas Pine Land Association (40 S. W. Rep. 843), where the Land Company gave notice that it would discharge employees who did not trade at its store, but bought supplies of Robinson, the court held that there was no actionable wrong. As Chief Justice James said: "If the defendant could so control its employees as to prevent their dealing with plaintiff, or so control their wages as to divert them from the channels of the plaintiff's business in favor of his own, we know no rule making it actionable. Had the defendant no proper interest of his own to subserve in so doing, but had acted wantonly in causing loss to plaintiff, the rule would have been different. The fact that defend-

ant's purpose by the act was to break plaintiff up in business would not give the cause of action, for that is the natural result of successful competition."

It is submitted that both of these cases are good law, but it would be impossible to reconcile them without the theory here defended; however, this general theory is now so well accepted that it no longer requires an elaborate defense. The right of every man in any business to adequate protection of his probable expectancy is now well established; but equally well recognized is the necessary justification of any damage caused a business rival in the regular course of fair competition.

IX

What is not justifiable under these rules is seen in London Guaranty and Accident Company *v.* Horn (206 Ill. 493). One Horn, while in the employ of Arnold, Schwinn & Co., suffered the loss of two fingers on his right hand while attempting to operate a milling machine. At the time of this injury Arnold, Schwinn & Co., carried an indemnity policy in the London Guaranty and Accident

Company, which provided that the Guaranty Company could cancel the policy at any time upon giving five days' notice. Horn brought suit against Arnold, Schwinn & Co., in which a verdict was subsequently rendered for $3500, from which judgment an appeal was taken, which was pending at the time of the trial of this case. Pending that suit, one Robinett, representing the Guaranty Company, called at the factory of Arnold, Schwinn & Co., where Horn had been employed, and offered Horn $100 in settlement of his claim, telling him that unless he accepted that amount he would have him discharged by Arnold, Schwinn & Co. Robinett then said to O'Connell, in the presence of Horn, that O'Connell would have to discharge Horn, as he refused to give the company a release. O'Connell at first was much disinclined to discharge Horn; but finally did so upon the threat being made that otherwise the Guaranty Company would cancel the policy. The Illinois Court held that Horn could recover from the Guaranty Company the damages caused him by losing his job. Mr. Justice Scott thus concluded his opinion: "It follows therefore that the act of the defendant complained of was

wrongful, and in the legal sense of the term malicious, because without justification."

To be compared with this is a case upon the other side of the line. The facts are essentially alike, except for the new factor that there is competition between the litigants. In this case of Walsh *v.* Dwight (40 N. Y. App. Div. 513) it appeared that the Dwight concern, the proprietors of the Cow Brand of saleratus, sold their product to jobbers upon special terms, giving a rebate to those jobbers who would agree not to sell any saleratus or soda in bulk or in boxes at less price than the list rates for Dwight's Cow Brand. The Walsh concern complained that thereby they were unable to market their products through these jobbers at all, since none would buy their less known goods at these prices; and they added that the prices asked for the Cow Brand were fictitious and extortionate, caused by extensive and extravagant advertising. But naturally Mr. Justice Ingraham could see nothing illegal in what was being done in this case, since the justification of competition was apparent. "The defendants simply offered to parties purchasing their goods to make a reduction in the price of the goods sold, in

consideration of the purchasers agreeing not to sell the goods at a less price than that named, and not to sell the goods of other manufacturers at a less price than that at which they agreed to sell the defendants' goods. It is difficult to see upon what ground it can be claimed that such a contract is illegal."

X

It is because of the underlying public policy that lawful competition justifies interference with the business of another. The theory is that free competition is for the best interests of society; for it is believed that the law does its best for all when it gives to every man an equal chance. Enough has been quoted to show how inveterate the belief has become that free competition is for the best interests of society. The State acting through the courts is permitting the desperate struggle for individual advancement to go on with the fewest possible rules, because the most of us believe that this is for the best for all of us. It is not a perfect way of ordering our world—far from it. No economist can fail to see that the competitive system has not only its costly mistakes,

but its inevitable wastes. Moreover, there is, in some lines of production and distribution, a danger that, if the law permits competition to go to every length, the survival only of the fittest may unduly reduce the number of the competitors, so that in the end much of the benefit of competition may be lost. Most of us still believe that the advance in the arts and the march of commerce in modern times have been due to the incentive of competition. More than this, we believe that never in the history of mankind has the exceptional man had such opportunity, nor the average man such return for his industry, as in modern times under the competitive system. And, as we have seen, so long as this is public opinion, the public policy for free competition will remain.

NOTE

ONE is quite justified by the latest authorities in basing everything upon this fundamental theory, that intentional interference with business rights is *prima facie* a clear tort, and that, unless plain justification be sufficiently shown, action lies. See, among many others, the following cases: Chipley *v.* Atkinson, 23 Fla. 206; Hollenbeck *v.* Ristine, 114 Iowa, 358; London Guaranty Co. *v.* Horn, 206 Ill. 493; Tuttle *v.* Buck, 107 Minn. 145; Klengel *v.* Sharp, 104 Md. 218; Kirkwood *v.* Finnegan, 95 Mich. 543. These principles are most elaborately worked out in the long series of able opinions in Massachusetts, the most informing of which is perhaps Pickett *v.* Walsh, 192 Mass. 572. And it is stated with the utmost accuracy in the New Jersey decisions, particularly in Jersey City Co. *v.* Cassidy, 63 N. J. Eq. 769.

This general theory is strongly opposed in recent times by the majority opinions in Allen *v.* Flood, 1898 A. C. 1, and in National Assn. *v.* Cummings, 170 N. Y. 315. But in view of later cases these opinions can hardly be said to represent the law even in their respective jurisdictions. Payne *v.* Railroad, 3 Lea. 507, and Raycroft *v.* Taynter, 68 Vt. 219, seem to be based upon this opposite theory. But Guethler *v.* Altman, 26 Ind. App. 587 and Heywood *v.* Tillson, 75 Me. 225, usually cited to the same effect, are plainly distinguishable, as there was certainly sufficient justification for the interference shown in the facts of those cases.

CHAPTER III

TYPES OF UNFAIR COMPETITION

I

MERE competition, however, is not a sufficient justification for taking away business from a rival; it must be fair competition as well. Generally speaking, a customer may be taken away from a rival by any fair inducement, but not by any unfair methods. Advertisement and solicitation, for example, are fair; fraud and intimidation, equally plainly, are unfair. That is held fair which the community regards as consistent with its safety; that is held unfair which the State considers dangerous to its peace. What is fair and what is unfair can hardly be more exactly defined without hampering us too much in dealing with new conditions. The predatory tactics of the modern trusts have shown us that there are new wrongs which our law must be prepared to meet. It is not enough to maintain an effective police against the old wrongs. There are new sins

against industrial society which the law must be capable of reaching. In dealing with the traditional law, however, one may generalize enough to cover the present situation. A narrow conception of the older cases would not give the law scope enough to meet these new conditions. But considered in a broad way the older cases will give us authority enough to deal with the present situation. For thus our common law, as a system of justice, proves itself, from age to age, capable of dealing with the wrongs of which that age complains.

II

The most obvious case of unfair competition would seem to arise where a customer who is under contract with one dealer is induced by another to break that contract. The first case in which this was held to be unfair competition was, however, the comparatively recent case of Lumley *v.* Gye (2 E. & B. 216). A Miss Wagner being under contract to sing for one Lumley, another manager, Gye, induced Miss Wagner to break her contract and sing for him. The court held that this inducement constituted a legal wrong, in analogy to the ancient action

for the enticement of a servant. Mr. Justice Earle indicated the wider ground upon which the case was decided. "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery; and both ought, on the same ground, to be made responsible."

The most recent case in England reaffirms this doctrine, upon a state of facts so extraordinary that it is worth the consideration of every student of present conditions. In Glamorgan Coal Company *v.* South Wales Miners' Federation (1903 2 K. B. 545), an action was brought by various owners of collieries against a miners' federation, claiming damages for wrongfully inducing workmen employed in the collieries to break their contracts of service. By an elaborate agreement between masters and men, the wages paid were upon a sliding scale—higher when the market for coal was up, lower when it was down; by another clause neither party to the contract could terminate it except by

notice given on the first of the month. In this state of facts, the executive committee of the Miners' Federation, believing that a restriction of production would raise the price of coal in the market, issued a manifesto that the workmen "should observe Fridays and Saturdays as general holidays." Counsel defended the Federation upon the ground that what was done was solely with the motive of advancing the interests of the men. But the Court of Appeal finally disposed of this contention, Lord Justice Sterling saying on that point: "The justification set up seems to me to amount to no more than this—that the course which they took, although it might be to the detriment of the masters, was for the pecuniary interest of the men; and I think it wholly insufficient. The defendants took active steps to carry this policy into effect, and, as I have said, interfered to bring about the violation of legal rights."

III

Upon the whole this English doctrine may be said to prevail in America, although there are several jurisdictions which hold that in the course of competition one may go so far as to

induce the breaking of contracts. In a recent Kentucky case, Chambers & Marshall *v.* Baldwin (91 Ky. 121), for example, the substance of the cause of action was that the plaintiffs had made a contract with one Wise for his crop of tobacco at five cents per pound, and that thereafter the defendants, with full knowledge of this contract, induced Wise to sell his crop to them at a higher price. But Judge Lewis said: "Competition in every branch of business being not only lawful, but necessary and proper, no person should, or can, upon principle, be made liable in damages for buying what may be freely offered for sale by a person having the right to sell, if done without fraud, merely because there may be a preëxisting contract between the seller and a rival in business, for a breach of which each party may have his legal remedy against the other. Nor, the right to buy existing, should it make any difference, in a legal aspect, what motive influenced the purchaser."

It should be noted, however, that it is universally agreed that "to induce a servant to leave his master's service at the expiration of the time for which the servant had hired himself, although the servant had no intention

at the time of quitting his master's service," is not actionable, to use the example put by Lord Kenyon in a leading case, Nichol *v.* Martyn (2 Esp. 732), to illustrate the principle that "everyone has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law it is *damnum sine injuria.*"

IV

Of course, if fraud is used in competition, it is illegal. Unfair competition of this sort has become all too common in modern trade; but the courts bid fair to curb it. One of the earlier cases which put the law on this point beyond all doubt went so far as to decide that men might not use their own names in trade so as to work fraud upon the public. In this case of Croft *v.* Day (7 Beav. 84) it appeared that a blacking manufactory had long been carried on under the firm name of Day & Martin at 97 High Holborn, London. A person by the name of Day, with one Martin, set up the same trade at 90½ Holborn Hill. The new concern marked their product as Day & Martin's blacking, using labels of a style similar to that used by the old concern. The Master of the Rolls

had no doubt of his right to issue an injunction under these circumstances: "It has been very correctly said that the principle in these cases is this,—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own."

We have innumerable modern instances to show how far the law will go to protect one manufacturer from fraudulent competition by his rival. One of the best reasoned of these is Waltham Watch Co. *v.* United States Watch Co. (173 Mass. 85). The plaintiff was the first manufacturer of watches in Waltham, and its watches had acquired a high reputation in the markets of the world as "Waltham watches" before the defendant began to do business there. It was found at the hearing that the public associated the goods of the plaintiff with the name "Wal-

tham watch"; and the injunction granted upon this showing restrained the defendants from calling its watches "Waltham watches," although it manufactured them in Waltham. Mr. Justice Holmes, in sustaining the injunction, gave the modern theory with characteristic exactness: "In cases of this sort, as in so many others, what ultimately is to be worked out is a point or line between conflicting claims, each of which has meritorious grounds and would be extended further were it not for the other. It is desirable that the plaintiff should not lose custom by reason of the public mistaking another manufacturer for it. It is desirable that the defendant should be free to manufacture watches at Waltham, and to tell the world that it does so. The two desiderata cannot both be had to their full extent, and we have to fix the boundaries as best we can. On the one hand, the defendant must be allowed to accomplish its desideratum in some way, whatever the loss to the plaintiff. On the other, we think the cases show that the defendant fairly may be required to avoid deceiving the public to the plaintiff's harm, so far as is practicable in a commercial sense."

V

Libelous statements must not be used to turn customers from a rival. Indeed the law has always been unusually considerate of the reputation of tradesmen; and when one publishes of a tradesman or merchant any matter in relation to his calling which, if true, would render him unworthy of patronage, one is liable to an action, even without damage being shown. This was pointed out in the recent case of Davey *v.* Davey (50 N. Y. Supp. 161), and thus applied to the facts. "The litigants are brothers. The defendant carried on the grocery and tea business at No. 2295 First Avenue, and the plaintiff thereafter opened a similar business at No. 2331 First Avenue. The defendant threatened that, if the plaintiff opened a rival establishment near the defendant's store, he would break up the business of the plaintiff; and after the latter opened the store the defendant caused to be printed, and distributed broadcast, 5000 circulars, in which, after eulogistically describing the superiority of his wares and the advantage the public would derive by patronizing him, he said, of and concerning the plaintiff and his business

methods, that an unscrupulous grocer of the same name in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees' with a view to deceive the public, and may sell an inferior article. The words, though cunningly devised and put together, taken in their plain and popular sense, that in which the readers were sure to understand them, bear the construction that the plaintiff was an unprincipled grocer, that he was dishonest in his business, for he advertised Davey's teas and coffees with a view to deceive the public; and that he sold inferior articles, this being one of the characteristics of unscrupulous traders. While the defendant had the undoubted right to praise his own wares, he had no right to single out the plaintiff and not only denounce his wares, but, in connection therewith, impugn his business integrity."

Furthermore, a false statement in relation to the goods sold by a merchant may so injure him in his business as to give him a right of action for damages. There are cases enough in the books of this trade libel, as it is usually called. In the leading English case of Western Counties Manure Company *v.* Lawes Manure Company (L. R. 9 Exch.

218) the facts were these: The defendants published fabricated analyses of four artificial fertilizers, showing its own to be the strongest and the cheapest, and that of the plaintiffs to be the weakest and the dearest. By reason of these advertisements various persons, who, if they had not been told that which was untrue, would have continued to deal with the plaintiffs, were alleged to have ceased to deal with them. Commenting on these facts in his decision, Lord Bramwell said: "It seems to me, however, that where a plaintiff says, 'You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers,' an action is maintainable."

VI

What constitutes unfair competition opens up too large a subject for any considerable discussion here. It is enough to point out that the border line must be overstepped unquestionably before the competition will be held unfair. One or two cases will illustrate the extent to which competition will be allowed to go before the court will interfere. Perhaps the most interesting is White *v.* Mellin (1895

A. C. 154). The respondent was the proprietor of Mellin's Food; the appellant was the proprietor of Vance's Food. The original action was brought for the circulation of the following advertisement: "Notice—The public are recommended to try Dr. Vance's prepared food for infants and invalids, it being far more nutritious and healthful than any other preparation yet offered." The keen business insight of Lord Herschell was well displayed in his opinion in this case, when he brushed aside all the distinctions of counsel with: "Just consider what a door would be opened if this were permitted. That this sort of puffing advertisement is in use is notorious; and we see rival cures advertised for particular ailments. The court would then be bound to inquire, in an action brought, whether this ointment or this pill better cured the disease which it was alleged to cure—whether a particular article of food was in this respect or that better than another. Indeed, the courts of law would be turned into a machinery for advertising rival productions by obtaining a judicial determination which of the two was the better."

In a later case the English courts again

took the position that they would permit competition to go on without interference, unless something was done so outrageous as to be clearly wrong. In Hubbuck *v.* Wilkinson (1899, 1 Q. B. 86), it appeared that the plaintiffs and defendants were competitors in the paint business, and that defendants had advertised that, as the result of certain paint covering experiments conducted by them, their paint proved superior in every respect. The plaintiffs in their complaint alleged that the reports were untrue, but the divisional court summarily dismissed the complaint, which the Court of Appeal held it was right in doing, guarding itself, however, in this wise: " It is not necessary to consider how the case would have stood, if the defendants had not been rival traders simply puffing their own goods and comparing theirs with those of the plaintiffs. If the defendants had made untrue statements concerning the plaintiffs' goods beyond saying that they were inferior to, or, at all events, not better than, those of the defendants, or if the defendants were not rivals in trade and had no lawful excuse for what they said, it would not have been right summarily to strike out the statement of

claim as showing no reasonable cause of action."

VII

Intimidation may not be used in competition to frighten a customer from a rival. Our law often speaks in parables; and Keeble *v.* Hickeringill (11 East 574 note) is undoubtedly one of the most significant cases in our books. The plaintiff there declared that he was lawfully possessed of a close of land called Minott Meadow, a decoy pond, to which divers wild fowl used to resort and come: and the plaintiff had, at his own costs and charges, prepared and procured divers decoy ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit in taking them: the defendant knowing which, and intending to damnify the plaintiff in his vivary, and to fright and drive away the wild fowl used to resort thither, and deprive him of his profit, did resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder, did drive away the wild fowl then being in the pond, whereby the wild fowl were frighted away, and did for-

sake the said pond. Lord Holt, then Chief Justice, made of this suit one of the leading cases in our law. A few extracts from his opinion will show the fundamental principles upon which it is based: "I am of opinion that this action doth lie. It seems to be new in its instance, but is not new in the reason or principle of it. For, first, this using or making a decoy is lawful. Secondly, this employment of his ground to that use is profitable to the plaintiff, as is the skill and management of that employment. As to the first, every man that hath a property may employ it for his pleasure and profit, as for alluring and procuring decoy ducks to come to his pond. Then when a man useth his art or his skill to take them, to sell and dispose of, for his profit; this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases. But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plain-

tiff, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff."

Unfortunately, because of labor disputes, our modern books are filled with cases involving force in competition; but fortunately our courts bid fair to check violence in labor competition, as they are curbing fraud in trade competition. A recent case showing the lengths to which labor unions may go is Reinecke Coal Mining Co. *v.* Wood (112 Fed. 477). The United Mine Workers determined to make what was significantly called a "striking district" out of certain territory where coal mining was carried on, with the policy of forcing the operators there to yield to their demands by the terror inspired by the tactics adopted. A large force was encamped in the immediate neighborhood of the mines in that territory, and, it was plain enough that by the terror to be thus inspired, they designed to compel non-union labor employed there to join the United Mine Workers, and thereafter to strike if a certain scale of prices was not adopted by their employers. It should be noted that there was no strike then pending at any of the mines in the district; indeed, there appears to

have been little or no discontent among the laborers employed there. Evans, the district judge, treated the matter with the seriousness that the occasion demanded. The course of his reasoning was this: "It cannot be that this course was not meant to be an attempt to compel the complainant, by force and intimidation, to yield to the defendants' wishes and demands. The encampment of armed men in the vicinity of the mines was not meant for gentle persuasion or peaceable argument. Peaceable and argumentative persuasion is entirely admissible, but is not accomplished nor intended to be accomplished in that manner. The conduct of the defendants, on the contrary, had all the elements of terror and intimidation; and those elements, being intentionally present, were indubitably designed to compel the complainant to accede to demands it had the lawful right to decline or reject at its option. A court cannot shut its eyes to propositions so palpable."

VIII

It should be noted that two theories prevail as to the fundamental basis of the action for unfair competition. According to the

older view, when the act complained of is some recognized form of wrong against someone, it was formerly vaguely felt that this explained the right of action the injured competitor admittedly had. This idea showed itself most clearly in the great case of Allen *v.* Flood (1898 A. C. 1), in the House of Lords a few years ago. Briefly the facts in that case were that one Allen, who was representative of certain workmen, had intentionally procured the discharge of other workmen, who were working in violation of the policies of the union he represented, among whom was one Flood. Although a great majority of the justices who gave opinions upon this case from first to last were in favor of Flood, a majority of the House of Lords found for Allen. How the matter stood in the minds of this majority is best expressed by Lord Macnaughton in the following paragraph: "I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other

means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct, if it could be inquired into, was without justification or excuse."

The newer view of this situation is perhaps best set forth in the recent case of Jersey City Printing Co. *v.* Cassidy (63 N. J. Eq. 759), where, in issuing an injunction to protect an employer from undue interference by his striking employees, Vice Chancellor Stevenson said in part: "In the case before this court the Jersey City Printing Company claims the right, not only to be free in employing labor, but also the right that labor shall be free to be employed by it, the Jersey City Printing Company. A large part of what is most valuable in modern life seems to depend more or less directly upon 'probable expectancies.' When they fail, civilization, as at present organized, may go down. As social and industrial life develops and grows more complex these 'probable expectancies' are bound to increase. It would seem to be inevitable that courts of law, as our system of jurisprudence is evolved to meet the growing

wants of an increasingly complex social order, will discover, define, and protect from undue interference more of these 'probable expectancies.'"

IX

We have, therefore, these differing views of the nature of the action for unfair competition, opposed in a fundamental way. By what may be called the earlier theory, it is said that any man can do in trade whatever he pleases to get business away from another, provided he does nothing illegal in itself. But, by what is obviously the current philosophy of the matter, the beginning is made at the other end, by saying that every man engaged in business has a right to pursue his calling freely, and that consequently any interference with this business of his by another must be justified. What may, therefore, be carried forward into the subsequent discussion of various unfair practices in our complicated modern commerce, is the idea that to compete as one wills is not an absolute right in our law. On the contrary, competition is only a thing permitted by the State when its operation is for the best interests of established society, forbidden if it is carried

on under circumstances prejudicial to the social order. It cannot be said, therefore, at the outset in a discussion of competition by combinations, such as this is largely to be, that, when one man has an absolute right to compete as he chooses, thereupon ten men acting together have the same right to compete as they choose. The theory which has been developed here cuts in back of all this, by denying to single men the privilege to compete when that is opposed to sound policy. By this theory, whenever the operation of a combination is proved to be detrimental to the best interests of society, its course will be held illegal.

NOTE

It would be impossible to cite on this fly leaf even representative cases from the now almost innumerable cases which have arisen as to unfair competition. For the purpose of directing further the reading of any person who may be interested, the following cases where the competition was held fair (although close to the line) are selected from the long list of cases of this sort which might be cited. For example, in Evans *v.* Harlow, 5 Q. B. 624 (1844), and Young *v.* Macrae, 3 B. & S. 264 (1850), the court held that they would not give judgment against a merchant who was using rather extreme comparative statements in puffing his goods.

In Parson *v.* Gillespie (1898), A. C. 239, and Van Camp *v.* Cruikshank, 90 Fed. 814 (1898), the court refused to enjoin a manufacturer from putting out his goods in similar ways to those used by other manufacturers, on the ground that these were ways common to the trade. And in Allejo *v.* Worsley (1898), 1 Ch. 274 and West Virginia Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611 (1902), the court refused to consider the damage done by extreme competition as a basis for recovery. The right to build up a business to any size at the expense of one's rivals is sustained in Citizens' Light, H. & P. Co. *v.* Montgomery Light & W. P. Co., 171 Fed. 553 (1909); but as is pointed out in Lubricating Oil Co. *v.* Standard Oil Co., 42 Hun. 153 (1886), only fair means can be used in such aggrandizement.

CHAPTER IV

COERCION BY LABOR UNIONS

I

It is sometimes said that, although the working classes were once so unfairly treated by the law that they could do nothing for their own advancement, now the workingmen almost constitute a privileged class, free to do pretty much as they may choose. To one who follows the diverse currents of opinion that appear upon the surface of present-day discussion, it might seem, for example, that the doctrine of the open shop was in the greatest danger, if indeed the doctrine of the closed shop was not already established. One who fears thus forgets the law, with which is the final decision. Until the mass of men have deliberately changed their theories of society and adopted new ones in their stead, the law does not change fundamentally. From ancient times our law has been the protection of the freedom of the individual against the oppression of the com-

bination. So it remains to-day in the midst of alarms the steadfast exponent of the desire of the great majority of men for the maintenance of industrial liberty.

II

Our law against combinations goes back beyond legal memory. A learned editor of one of the Selden Society's publications (1 Pleas of the Crown 125) has found a case for us as early as the year 1225 of an action for interference with an established business by conspiracy. "The Abbot of Lilleshall complains that the bailiffs of Shrewsberry do him many injuries against his liberty, and that they have caused proclamation to be made in the town that none be so bold as to sell any merchandise to the Abbot or his men upon pain of forfeiting ten shillings, so that Richard, the bedell of the said town, made this proclamation by their orders. And the bailiffs defend [i.e. deny] all of it, and Richard likewise defends all of it, and that he never heard such proclamation made by any one. It is considered that he do defend himself twelve handed, and do come on Saturday with his law."

All through our books from the beginning there are cases both civil and criminal upon combination and conspiracy, as things apart from individual right and wrong. Probably the leading case is Rex *v.* Journeymen Tailors of Cambridge (8 Mod. 10). One Wise and several other journeymen tailors were indicted for a conspiracy amongst themselves to raise their wages and were found guilty. On motion in arrest of judgment the court said: "The indictment, it is true, sets forth that the defendants refused to work under the wages which they demanded; but although these might be more than is directed by the statute, yet it is not for the refusing to work, but for conspiring that they are indicted, and a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them to do, if they had not conspired to do it."

III

Well down into the nineteenth century, if workmen acted in concert in any way against their masters they were in danger of being held conspirators both in England and America. But this law that mere combina-

tion was a conspiracy, without regard to acts or objects, gradually became obsolete. Combination is now permitted for the furtherance of certain ends by certain means; but it is not true to say that it is permitted for any purpose by any method. It is necessary to-day, therefore, to make distinctions before it can be determined what plans may be pursued by a combination to advance its interests. The fundamental distinction in the modern law is well shown by a parley between Judge and counsel in the case of Re Doolittle and another, strikers (23 Fed. 544), thus reported:—"*Mr. Charles C. Allen.* Do I understand your Honor to say that the act of striking, merely carrying out of the strike—was unlawful? *The Court* (Judge Brewer): It is not the mere stopping themselves together, but it is preventing the owners of the road from managing their engines and running their own cars—that is where the wrong comes in. Anybody has a right to quit work, but in interfering with other persons working, and preventing the owners of railroad trains from managing those trains as they see fit—there is where the wrong comes in."

This distinction is carried to its logical

extent in the case of the sympathetic strike—as may be seen in Old Dominion Steamship Company *v.* McKenna (30 Fed. 48). This action was brought to recover $20,000 damages, alleged to have been sustained by the plaintiff through the unlawful action of the defendants in a strike of longshoremen, and in their attempt to boycott the plaintiff in its business. The defendants styled themselves the Executive Board of the Ocean Association of the Longshoremen's Union. Not being in plaintiff's employ, and without any legal justification so far as appeared, they procured plaintiff's workmen in New York and in southern ports to quit work in a body, until it should accede to the defendants' demands and pay southern negroes the same wages as New York Longshoremen. Mr. Justice Brown held that such unwarrantable interference by these combined defendants constituted an invasion of the business right of the steamship company. His reasoning is thoroughgoing, as the following extract will show: "Associations have no more right to inflict injury upon others than individuals have. All combinations and associations designed to coerce workmen to become members, or to interfere with, ob-

struct, vex, or annoy them in working, or in obtaining work, because they are not members, or in order to induce them to become members, or designed to prevent employers from making a just discrimination in the rate of wages paid to the skillful and to the unskillful, to the diligent and to the lazy, to the efficient and to the inefficient, and all associations designed to interfere with the perfect freedom of employers in the proper management and control of their lawful business, or to dictate in any particular the terms upon which their business shall be conducted, by means of threats of injury or loss, by interference with their property or traffic, or with lawful employment of other persons, or designed to abridge any of these rights,—are *pro tanto* illegal combinations or associations; and all acts done in furtherance of such intentions by such means, and accompanied by damage, are actionable."

By the present law, then, mere striking is not in itself wrong; and, therefore, merely threatening to strike is permissible in itself. But on the other hand, the trades union is always put to its justification whenever a strike is called or planned. Individuals who interfere with the existing relations of others

must show some affirmative reason in public policy why they should be excused; and by the same theory whenever the operations of a combination are proved to be subversive of the true interests of society, its actions will be stopped. Moreover, the interests of the strikers must be directly involved in order to justify their intermeddling. In a sympathetic strike, as has been seen, anything that they may do will be held illegal. But if the strike is for their own immediate betterment, for shorter hours or for higher wages, then their striking, being justifiable in itself, the question arises as to what methods they may be permitted to employ to keep their places open. It is obvious that distinctions must be taken here as to the methods which it is wise to permit in competition by combination; and indeed there may well be a departure from the rules which have been laid down as to the methods which individuals may employ in competition.

IV

The clearest illustration of this difference is the boycott. About the year 1880, one Captain Boycott was a farmer of Lough

Mark in the district of Connemara. This Boycott was also agent of the principal landlord, Lord Erne; and in his capacity as agent in that year had served notice upon several of the tenants. The result is a matter of history. The population of the region for miles around resolved to have nothing to do with him, and, as far as they could prevent it, not to allow anyone else to have anything to do with him. His laborers fled from him; and none would come in their places. No one would supply him with food; he was cut off from every near base of supplies. No one would speak with him; he was excommunicated from all intercourse with his fellows. Then the government sent a force of soldiers to Lough Mark, and under their protection the Boycotts returned to their position as citizens in a civilized community. Thus the episode closed, but the language had gotten now a new word—boycott—to commemorate that event. A new danger had been made known which spread terror throughout society. A new condition, therefore, confronted the law, requiring its protection.

The leading case upon boycott in America is Crump *v.* Commonwealth (84 Va. 927).

In this case the strikers dragged the whole community into their dispute. They published a blacklist upon which they put the names of every hotel, boarding house, tradesman, or shopkeeper who dealt with their former employers in any way, or who had anything to do with the new employees. Finally matters came to such a pass that the ringleaders were arrested; and, being found guilty by the jury, they appealed upon the points of law to the higher court. In dismissing the appeal Mr. Justice Fauntleroy spoke very sharply: "It was proved that the conspirators declared it their set purpose and persistent effort to 'crush' Baughman Brothers; that the minions of the boycott committee dogged the firm in all their transactions; followed their delivery wagons, secured the names of their patrons; and used every means short of actual physical force to compel them to cease dealing with Baughman Brothers—thereby causing them to lose from one hundred and fifty to two hundred customers and ten thousand dollars of net profit. The acts alleged and proved in this case are unlawful and incompatible with the prosperity, peace, and civilization of the country; and, if they can be perpe-

trated with impunity, by combinations of irresponsible cabals or cliques, there will be the end of government, and of society itself. Freedom—individual and associated—is the boon and boasted policy and peculium of our country; but it is liberty regulated by law; and the motto of the law is: *Sic utere tuo, ut alienum non laedas.*"

V

In the ruling case in the British Empire to-day, Quinn *v.* Leathem (1902 A. C. 495), we have one of the clearest examples of the sort of pressure which it must be obvious that a trades union should be forbidden to use, even to advance its own interests. The complainant in that case was a butcher engaged in business near Belfast. His employees organized a union to which they refused to admit one Dickie, a foreman; they later demanded of the plaintiff that he dismiss Dickie. Upon the plaintiff's refusal to do this the defendants representing the union went to one Munce, who bought meat of the plaintiff, and warned him that unless he stopped buying while the trouble was on, his own men would be called out next. Munce

at last yielded to this coercion, and notified plaintiff to send no more meat until he settled with his men. This interference with his business relations was the cause of the action, in which damages to the trade were claimed. The House of Lords, notwithstanding the contrary tendencies of Allen *v.* Flood, held for the plaintiff. The best opinion was that of Lord Lindley, who handled the question with characteristic method: "As to the rights of the plaintiff—he had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."

In current discussion an attempt is sometimes made to distinguish between this extreme case of secondary boycott, which has just been illustrated, and the lesser disturbance created by the primary boycott, as it is called, where only the members of the affiliated unions are worked upon to break off their business relations with dealers who persist in continuing to deal with the concern against which their attack is directed. But almost all courts find this sort of boycott practically as dangerous to the industrial peace as the other. In Barr *v.* Essex Trades Council (53 N. J. Eq. 301) the Council of the affiliated trades had exhorted its members in this wise: "Friends, one and all, leave this council-boycotting 'Newark Times.' Cease buying it. Cease handling it. Cease advertising in it. Keep the money of fair men moving only among fair men. Boycott the boycotter of organized fair labor." The New Jersey chancery court thought that it would be dangerous to industrial society to permit such appeals to go unchallenged. Vice Chancellor Green discussed the problem broadly thus: "The freedom of business action lies at the foundation of all commercial and industrial enterprises—men are willing

to embark capital, time, and experience therein, because they can confidently assume that they will be able to control their affairs according to their own ideas, when the same are not in conflict with law. If this privilege is denied them, if the courts cannot protect them, if the management of business is to be taken from the owner and assumed by, it may be, irresponsible strangers, then we will have come to the time when capital will seek other than industrial channels for investments, when enterprise and development will be cripples, when interstate railroads, canals, and means of transportation will become dependent on the paternalism of the national government, and the factory and the workshop subject to the uncertain chances coöperative systems."

VI

As our law stands, therefore, in some instances concerted action is permitted, while against many kinds of joint action redress may be had. It has been seen that simple striking is permitted in certain cases; a combination of laborers may, for example, demand higher wages, and then leave in a body

if the increase is not granted. On the other hand, it has been seen that workmen may not bring their combined force to bear upon persons who have no part in the dispute to induce them not to deal with their former employers. The problem of the legality of the use of its great power by the trade union to force non-union men out of the same employment lies somewhere between these two extremes. As this is one of the most important of modern questions, it might be well to state the leading cases with considerable detail, so that there may be clear appreciation of the precise issue involved.

In Lucke *v.* Assembly (77 Md. 396), we have a rather aggravated case of unionizing a shop. The plaintiff was a non-union man; he was non-union against his will, as it were, because the Assembly had repeatedly refused to take him in, although he had several times applied for membership. Later the Assembly demanded of their employers, that they discharge this non-union man, Lucke. Rosenfeld Brothers could not withstand the pressure; and they discharged Lucke at this dictation. Lucke then sued the Assembly for damages for the loss of his job; and he was successful in his suit. Upon the final

appeal Mr. Justice Roberts gave these as the reasons: "In this case, we think the interference of the appellee was in law malicious and unquestionably wrongful. The appellant was a man of family, a good workman, engaged in a lawful pursuit, performing his duties in an entirely satisfactory manner, without objection in any respect, and willing and desirous of becoming a member of the appellee if an opportunity had been afforded him. He was not able to obtain membership with the appellee, nor was he permitted to continue his work with his employers, who would gladly have retained him in their service, if they could have done so without loss or embarrassment to themselves. If, therefore, the appellee sought to bring about the discharge of the appellant under the circumstances detailed in the evidence, if not malicious it was certainly wrongful, and by so doing it has invaded the legal rights of the appellant for which an action properly lies."

A recent case in point is even more thoroughgoing in its denunciation of these attempts by the unions to force non-union men out of the same employment. In Erdman *v.* Mitchell (207 Pa. St. 79), there appeared

in evidence a series of labor difficulties in the construction of a building too involved to relate fully here. Finally the Central Union showed its hand, and threatened a general strike unless certain men engaged on the work, who were not members of an affiliated union, should be immediately laid off. An application was made in time for an injunction, which the lower court granted and the upper court confirmed. Mr. Justice Dean said, in granting the injunction: "Trades unions may cease to work for reasons satisfactory to their members, but if they combine to prevent others from obtaining work by threats of a strike, or combine to prevent an employer from employing others by threats of a strike, they combine to accomplish an unlawful purpose—a purpose as unlawful now as it ever was, though not punishable by indictment. Such combination is a despotic and tyrannical violation of the indefeasible right of labor to acquire property, which courts are bound to restrain. It is argued that defendants, either individually or by organization, have the right now to peaceably persuade plaintiffs and others not to work, and their employer not to hire them. So they have. It is further argued that they can

quit work when they choose. So they can. But neither of these suggested cases is the one before us. Here a strike on a large building was declared because plaintiffs would not join the particular society. The declared purpose of the strike was to cause loss of employment to plaintiffs because they would not join the Allied Building Trades, and chose to remain faithful to their own union, The Plumbers' League."

The cases brought up for discussion in this section are undoubtedly less extreme than the cases under consideration in the preceding section. It may be admitted that in the case of unionizing, the ultimate motive of the union is to advance its own interests; but so it is in boycotting. In boycotting the end was held not to justify the means; and this may well enough be true of unionizing. The principal question is, then, whether this sort of concerted action is to be held justifiable or not. In this respect a difference may be urged between boycotting and unionizing; it may be said that in boycotting the methods employed are indirect, and much unnecessary damage is therefore done to third parties; while in unionizing it may be claimed that the methods are direct, and that there

is no unnecessary damage. But the fact remains that both in the case of boycotting and in the case of unionizing we see the resistless force of numbers employed against the individuals attacked. The fear of this lies at the bottom of all of our laws against conspiracy from time immemorial.

VII

At least it may be made a working hypothesis that in unionizing we have the legal wrong of conspiracy against those forced out of the employment. A case so extreme that almost all courts would agree upon it, is Curran *v.* Galen (152 N. Y. 33). It appeared that in Rochester there was an agreement between the Ale Brewers' Association and the Brewery Workingmen's Assembly that no person not a member of the association should be retained in the employment of any member of the association. The plaintiff got employment in one of the breweries, but declined to join the union. The whole opinion of the Court of Appeals follows: "The organization of the local assembly in question by the workingmen in the breweries of the city of Rochester may have been per-

fectly lawful in its general purposes and methods and may, otherwise, wield its power and influence usefully and justly, for all that appears. It is not for us to say, nor do we intend to intimate, to the contrary; but so far as a purpose appears from the defense set up to the complaint that no employee of a brewing company shall be allowed to work for a longer period than four weeks, without becoming a member of the Workingmen's Local Assembly, and that a contract between the local assembly and the Ale Brewers' Association shall be availed of to compel the discharge of the independent employee, is, in effect, a threat to keep persons from working at the particular trade and to procure their dismissal from employment. While it may be true, as argued, that the contract was entered into, on the part of the Ale Brewers' Association, with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention cannot aid the defense, nor legalize a plan of compelling workingmen not to join it, at the peril of being deprived of their employment and of the means of making a livelihood."

Plant *v.* Woods (176 Mass. 492) shows

one of the latest developments in this general problem. This was a case of a contest for supremacy between two labor unions of the same craft, having substantially the same constitution and by-laws. The chief difference between them was that the plaintiff union was affiliated with one national organization, while the defendant union was affiliated with another. It appeared that the members of the defendant union declared " all painters not affiliated with the Baltimore headquarters to be non-union men," and voted to " notify the bosses " of that declaration. This action was for an injunction to prevent threats being made in pursuance of this vote. Mr. Justice Hammond stated the following reasons of the court for confirming the injunction against the defendants: " It is to be observed that this is not a case between the employer and the employed, or, to use a hackneyed expression, between capital and labor, but between laborers all of the same craft, and each having the same right as any one of the others to pursue his calling. In this, as in every other case of equal rights, the right of each individual is to be exercised with due regard to the similar right of all others, and the right of one must be said to

end where that of another begins. The right involved is the right to dispose of one's labor with full freedom. This is a legal right, and it is entitled to legal protection."

The majority of courts thus believe that an organized union should not be allowed to work its will, that it would mean disruption of the industrial order if a union could be permitted to dictate who should work and who should not. As a matter of law, the question whether the members of a union are liable when they demand that their shop be unionized depends upon whether the courts will find some basis for justification. But although the public policy is doubtful, most courts seem to be convinced that to allow unionizing would be prejudicial to the best interests of society. The public wants the best services that can be gotten at the lowest wages that will be accepted. If we are to believe much testimony that is brought forward in current discussion, unionizing means less efficient services and increasing wages. This, then, is an instance for the assertion of the general policy of the law against combination in restraint of trade. Our general law is, of course, opposed to schemes to control the market in any such way.

VIII

There is some dissent to these prevalent doctrines; and in order that the discussion may be quite fair it is necessary to give this minority a chance to be heard. The principal case on the other side is undoubtedly National Protective Association *v.* Cummings (170 N. Y. 315). The facts in this case as they were brought out at the trial were somewhat complicated, as the final developments in the industrial organization have become so complex. The complainants were a formal association themselves, who sued both collectively and individually; the defendants were also an association and the individual members of it. The defendant association wanted to put its men at work upon certain works in the place of certain men belonging to the rival association. They were in a position to enforce their demands, as they had strong affiliations with the building trades in New York. The trial court found that the walking delegate of the older association threatened to cause a general strike against the members of the newer association, wherever he found them at work upon the same jobs with his men. The opinion in this case de-

serves respectful consideration, as it is by former Chief Justice Parker; but the basis of his opinion is the obsolete argument that any single man may quit work alone. "The principles quoted above recognize the legal right of members of an organization to strike, that is, to cease working in a body by prearrangement until a grievance is redressed, and they enumerate some things that may be treated as the subject of a grievance, namely the desire to obtain higher wages, shorter hours of labor, or improved relations with their employers, but this enumeration does not, I take it, purport to cover all the ground which will lawfully justify members of an organization refusing in a body and by prearrangement, to work. The enumeration is illustrative rather than comprehensive, for the object of such an organization is to benefit all its members; and it is their right to strike, if need be, in order to secure any lawful benefit to the several members of the organization as, for instance, to secure the reemployment of a member they regard as having been improperly discharged, and to secure from an employer of a number of them employment for other members of their organization who may be out of employment,

although the effect will be to cause the discharge of other employees who are not members."

Another case that plainly holds for the union is Clemmitt *v.* Watson, (14 Ind. App. 38). In this case, a body of employees in a coal mine organized as a union and demanded the discharge of a certain man not a member of their union. The owners refusing to discharge him, a strike was called; whereupon the employers yielded, and the man was discharged. A suit was thereupon brought by the man forced out to recover damages caused by the conspiracy. The gist of Mr. Justice Garvin's opinion was this: "There is no law to compel one man or any body of men to work for or with another who is personally obnoxious to them. We cannot believe it to be in accordance with the spirit of our institutions or the law of the land to say that a body of workmen must respond in damages because they, without malice or any evil motive, peaceably and quietly quit work which they are not required to continue, rather than remain at work with one who is for any reason unsatisfactory to them."

Whatever weight may be given to these two decisions as authority, they represent

the view of the minority; for the contrary holding now undoubtedly has the majority. It is, therefore, the general American law that legal wrong is done by a union in procuring the discharge of a non-union man. Even if their motive is self-interest, to get all the work for their own members, still most courts hold that the union cannot be allowed to use the force of its members to crush the non-union man. The law of conspiracy from time immemorial has protected the single man against the attack of the combination. This is a modern instance for its application. Any discussion which leaves out the fact of conspiracy, and defends the union upon the basis of the permission given individuals to compete as they please, misses the real point upon which the issue turns. To maintain free competition in general, the courts must prevent suppression of competition by the action of the combination.

IX

To suggest further distinctions, two of the most recent cases, to a certain extent opposite in tendency, should be considered. One, Pickett *v.* Walsh (192 Mass. 572), is the most recent of the long line of excellent

decisions in Massachusetts dealing with the respective rights of capital and labor. The plaintiffs were brick and stone pointers; the defendants were officers and members of bricklayers' unions and stone masons' unions. One ground of complaint was that the plaintiff was forced out of employment by the threat of the defendant unions that they would do no laying unless the pointing was done by their members. This policy Mr. Justice Loring held justifiable: "It was within the rights of these unions to compete for the work of doing the pointing, and in the exercise of their right of competition to refuse to lay brick and set stone unless they were given the work of pointing them when laid." The other ground of complaint was that the unions, in order to get these plaintiffs discharged from one job, threatened a strike upon other jobs. The court held that this was not justifiable: "That strike has in it an element like that in the sympathetic strike, in a boycott, and in blacklisting, namely,—It is a refusal to work for A, with whom the strikers have no dispute, for the purpose of forcing A to force B to yield to the strikers' demands. In our opinion organized labor's right of compulsion and coercion is

limited to strikes on persons with whom the organization has a trade dispute; or to put it in another way, we are of opinion that a strike on A with whom the striker has no trade dispute to compel A to force B to yield to the strikers' demands is an unjustifiable interference with the right of A to pursue his calling as he thinks best."

The other case in mind is Pierce *v.* Stablemen's Union (156 Cal. 70). This was an injunction procured in the course of a strike called to make the plaintiff unionize his stable. Unionizing being legal in itself in California, the upper court was clear that no injunction should be so broad as to prevent the bringing about of this result by mere representations, even when amounting to coercion. The real issue to their mind was whether boycotting and picketing should be allowed. As for the boycotting feature, the California court takes its position with the small minority which permit it in every form, primary as well as secondary. "Each rests upon the right of the union to withdraw its patronage from its employer and to induce by any fair means all persons to do the same; and in the exercise of those means, as the union would have the unquestioned rights

to withhold their patronage from a third person who continued to deal with their employer, so they have the unquestioned right to notify such third person that they will withdraw their patronage if he continues so to deal." But as to picketing, the California court unexpectedly allies itself with the majority of courts, which forbid all picketing, "peaceful" as well as "violent." "A picket in its very nature," said Mr. Justice Henshaw "tends to accomplish and is designed to accomplish these very things. It tends to and is designed by physical intimidation to deter other men from seeking the places vacated by the strikers. It tends to and is designed to drive business away from the boycotted place, not by the legitimate means of persuasion, but by the illegitimate means of physical intimidation and fear."

X

The issue is, then, whether what is permitted individuals should be permitted a combination. The minority say that, as one person in competition is permitted to refuse to deal with those who will not deal with them exclusively, even though the ruin of a rival follows, so a union ought to be allowed the

same course of action. But is it fair to say that concerted action is of the same nature as separate action? Certainly, it is the usual fact that individual competition may be met, while combined action is overwhelming. The truth is with the majority of the courts, that the combination gives to concerted action higher potentiality than separate action by individuals can ever have. Both boycotting and unionizing are conspicuous examples of the resistless force of numbers, and this underlying basis of fact is explanation enough of the substantial similarity of the way in which both are treated by the courts. Until individualism shall cease to be the predominant theory, the courts will continue to hold unionizing wrong. Unionizing will not become legal unless the arguments for collectivism, shall ever command the adherence of the great majority of men. If that time comes, the law, it seems, must regulate the admission to the unions to which it would thus concede the control of the labor market. For regulation, as we shall see throughout this discussion, is the only basis upon which monopoly can be permitted. If, finally, the law should concede the closed shop, it very probably will require an open union.

NOTE

THE position taken in this chapter that the non-union man is protected against the union is the law of the following jurisdictions at least: Maine—Perkins *v.* Pendleton, 90 Me. 166 (1897); Maryland—Lucke *v.* Clothing Cutters' Assembly, 77 Md. 396 (1893); Massachusetts—Plant *v.* Woods, 176 Mass. 492 (1900); Michigan—Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497 (1898); Minnesota—Gray *v.* Building Trades' Council, 91 Minn. 171 (1903); Pennsylvania—Erdman *v.* Mitchell, 207 Pa. (1903).

In the following jurisdictions the issue is in doubt: England—Allen *v.* Flood (1898), A. C. 1 and Perrault *v.* Gauthier, 28 Can. Sup. 241 (1897), are for the union, but Quinn *v.* Leathem (1901), A. C. 495 and Giblan *v.* National Amalgamated Union (1903) 2 K. B. 600, are distinctly for the non-union man; New York —Curran *v.* Galen, 152 N. Y. 33 (1897) and Davis Machine Company *v.* Robinson, 41 Misc. 329 (1903) are for the non-union man, but National Protective Association *v.* Cumming, 170 N. Y. 315 (1902) and Davis *v.* United Hoisting Engineers, 28 App. Div. 396 (1898), hold for the union.

In the following jurisdictions at least the law permits the union to force the non-union man out: California—Pierce *v.* Stablemen's Union, 156 Cal. 70 (1909); Indiana—Clemmit *v.* Watson, 14 Ind. App. 38 (1895); Montana—Lindsay *v.* Montana Federation, 37 Mont. 264 (1908); New Jersey—Mayer *v.* Journeymen Stonecutters' Association, 47 N. J. Eq. 519 (1890).

CHAPTER V

PRESSURE BY TRADE COMBINATIONS

I

EVEN to the most superficial observers of current events, it is clear that the competitive system is much threatened from many quarters. Undoubtedly the industrial order in the first half of the twentieth century is going to be a different thing from the business organization of the first half of the nineteenth century; but whether this change is to be one in kind, or one merely in degree, remains to be seen. At the present moment, despite adverse movements, the substance of competition is still to be found in the general course of most of industrial activities for the greater part of the time. This condition can be maintained if all the conservative forces of society are exerted; and among these one of the most potent is the law. The courts are manifesting the greatest activity at the present time at various points where the disturbing force of the predatory combination

is making itself felt. The principal issue is whether there is a difference between the methods in competition which may be employed by an individual in competition, and the course of action that may be taken by a combination. For example, may a combination engaged in competition refuse to have any business dealings with those who continue to have commercial relations with its rivals? It is obvious that if the combination be permitted to compete in this way (as individuals may), the ruin of the rival, thus cut off from his sources of supply, will very often result.

II

As has been seen in an earlier chapter, the general legal theory of the most accurate observers of these current industrial phenomena is that every person engaged in business has a legal right to his trade; consequently those who interpose themselves between a trader and the persons who would deal with him commit what is *prima facie* a wrong by this very interference. One who intermeddles with the business relations of another is thus put to his justification; and among the initiated,

therefore, the problem of legality has become a question of justification. As to the grounds upon which such justification may rest, there are many of these, as has already been indicated. For the present purpose it is enough that fair competition is an accepted excuse. But if the motive or the method be bad, it is not fair competition; and the justification consequently fails. A striking case of unfair action under this rule is the blacklist. In the case of Hundley *v.* Louisville & Nashville Railroad (45 S. W. Ky. 439), it appeared that many railroads had agreed among themselves to refuse employment to any man who was reported to their blacklist office (jointly maintained) as having ever been party to a strike. The court held that although any railroad might separately have adopted this policy, their combination to stand by this blacklist was another matter. It was thought to be plainly the policy of the law that a man should be free from molestation in his business relations. The only thing lacking was a showing that he had actually been refused employment by reason of this combination against him. For, however evil their intentions may have been, this complainant must show damage to him of

some sort in order to have a standing in court.

This law is shown again in Doremus *v.* Hennessy (176 Ill. 608). It was set forth in this complaint that the members of an organization known as the Chicago Laundrymen's Association had fixed a scale of prices for laundry work, and had conspired to injure the complainant in her good name and credit and to destroy her business because she would not charge prices in accordance with such scale. The court decided in her favor, Mr. Justice Phillips saying: "A combination by them to induce others not to deal with appellee or enter into contracts with her, or to do any further work for her, was an actionable wrong. Every man has a right, under the law, as between himself and others, to full and free disposition of his own labor and capital according to his own free will, and anyone who invades that right without lawful cause or justification commits a legal wrong, and, if followed by an injury caused in consequence thereof, the one whose right is thus invaded has a legal ground of action for such wrong." Whenever, therefore, the operations of a combination in the course of competition are proved to be detrimental to the best in-

terest of society, its members may be held to be wrongdoers by reason of what they have done. For what is to be held fair in competition, and what is unfair, is by this analysis all a question of public policy, which may well be different in the case of concerted action than in the case of individual action.

III

It must be remembered that we have always to reckon with the established law for freedom in competition, and the undoubted desire for its maintenance. Competition is firmly believed, by the mass of men, to be worth more to society than its costs; and, therefore, so long as competition by a combination has no different effect upon the course of trade than competition by an individual has, it must be allowed to go on, however ruinous it may be to rivals in business. Not until we have a plain case where combined effort can be shown to be quite different in its operation from individual action, can the competition of a combination be held unfair, if similar methods are held fair enough for an individual. When this is so it will usually be seen that, in order to

preserve the freedom of the individual in trade, the freedom of a combination must be curbed.

Perhaps the most noteworthy case in this connection is Mogul Steamship Company *v.* McGregor (L. R. 23 Q. B. D. 598), because of the great opinion of Lord Justice Bowen. The facts of that case make it a crucial one. The defendants were a number of ship-owners who formed themselves into a league or "conference" for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object, and to discourage the plaintiffs' vessels from resorting to those ports, the defendants, during the "tea harvest" of 1885, combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. Moreover, they offered a rebate of five per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the conference—a rebate which would be forfeited if, at any time, outside ships were used. It

is impossible to give a fair impression of Lord Bowen's opinion by extracts from it; but his points may be shown. Considered as mere competition he found, as we have seen already, no cause of action. On the point of combination as an element in the case, he could not see that this made any difference. It was perfectly legitimate, he thought, to combine capital for all mere purposes of trade for which capital might, apart from combination, be legitimately used in trade. As to his first point, it would seem that the same policy which permits an individual trader to cut prices to any extent, although his rival is thereby ruined, would allow a combination to lower rates in competition against its rivals. Indeed, looked at from one point of view, the public is benefited more when many lower prices than it is when a single man does; and a rival must meet the low price made by his combined rivals as he must the reduced rate of a single opponent, or else go out of business. But as to the second point —query. Shall a combination be permitted to take the attitude that they will charge a higher price to those who deal with a rival— may a rival who is thus driven out of business say that this is unfair competition? This

issue must again be decided upon the balance of social advantage, and requires, therefore, the fuller discussion which it receives in this and later chapters.

A rather similar case is John D. Park & Sons Company *v.* National Wholesale Druggists' Association et. all. (175 N. Y. 1). The facts in that case in brief were these: The manufacturers of certain proprietary medicines and an association of wholesale dealers therein entered into an agreement to sell the goods at a uniform jobbing price for fixed quantities only to such dealers as would conform to the manufacturers' price list in making sales of goods. All wholesale dealers had the right to purchase the goods from the manufacturers upon the same terms as members of the association, on agreeing to maintain the prices established by the manufacturers. The complainants were unwilling to maintain the trade prices upon the medicines they purchased; and they brought this complaint for being charged the "long" price, alleging that it was by reason of the conspiracy of the defendants that they were unable to get the discount rate. The case was finally dismissed in the Court of Appeals, upon a course of reasoning which may be

seen in the following extracts from the opinion of Mr. Justice Haight: "Is this plan against public policy? An active competition and rivalry in business is undoubtedly conducive to the public welfare; but we must not shut our eyes to the fact that competition may be carried to such an extent as to accomplish the financial ruin of those engaged therein, and thus result in a derangement of the business, an inconvenience to consumers, and in public harm." The argument for the validity of special favors by a combination is stated most attractively when it is said that there is no real pressure exerted by the combination upon anyone; simply those outside the combination get an advantage if they accept the terms, while they do not get the benefit of the concession unless they conform to the rules.

IV

Cases now engage our attention where the disturbance of the industrial peace by the coercion exerted by a combination in its competition is much more serious. What, unfortunately, is a typical case is seen in Jackson *v.* Stanfeld (157 Ind. 592). Jackson was

a broker engaged in buying and selling lumber; Stanfeld was a member of a retail lumber dealers' association. The rules of this association provided that, if a wholesale dealer should sell lumber direct instead of through retailers who owned lumber yards, all the members of the association of the retailers would, upon notice, refuse to have further dealings with such a wholesaler. In holding this a conspiracy, Mr. Justice Dailey said: "The great weight of authority supports the doctrine, that where the policy pursued against a trade or business is calculated to destroy or injure the business of the person so engaged either by threats or by intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil suit for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation involved in it."

A more recent phase of the same problem is seen in the late case of Brown & Allen *v.* Jacobs Pharmacy Company (115 Ga. 429). Jacobs, the plaintiff, had formerly been a member of the local branch of the Retailers'

Association in Atlanta; but he had withdrawn from it upon charges being preferred against him for violation of its rules. The Atlanta Retailers' Association thereupon sent a letter to the Wholesalers' Association, representing that no retailer in the local association would buy of any wholesaler who sold to the rate cutter. Mr. Justice Fish promptly granted an injunction against such concerted action. "The individual right is radically different from the combined action. The combination has hurtful powers and influences not possessed by the individual. It threatens and impairs rivalry in trade, covets control in prices, seeks and obtains its own advancement at the expense and in the oppression of the public. The difference, in legal contemplation, between individual right and combined action in trade, is seen in numerous cases. To protect the individual against encroachments upon his rights by a greater power is one of the most sacred duties of the courts."

We have seen, then, that the law, as declared by the majority of courts, is to the effect that when a combination exerts its force upon outside dealers to prevent them from having any relations with rivals of the combination, the rivals have an action for the

damages caused by the interference. This law is applied, by the majority of courts, as it seems, consistently, when the power of the combination is brought to bear upon its own members to prevent them from having any dealings with those outside the combination. The same elements of wrong exist whether the attack of the conspirators upon their victim is indirect or direct. And the key to the general problem under discussion seems to be this, that coercion of the sort discussed here is wrong in itself, like fraud, and therefore, like fraud, an unfair method to use in competition. And conspiracy will always be considered to be a continuing wrong of which the law will take notice so long as it is true that an organized force has the power to overwhelm unorganized individuals. This principle of law that we have under discussion has therefore this foundation of fact, that a concerted refusal to deal disturbs the industrial order in a way which an individual refusal never can.

V

To be quite fair, it must be admitted that there is conflict of authority upon these matters. There are courts which hold that a

combination can use its force to drive the customers of a rival away; and these should be given a hearing if this investigation is to be conducted impartially. One of the strongest of these cases is MacCauley Bros. *v.* Tierney (19 R. I. 255). The complainants were master plumbers, engaged in business in Providence; the respondents were officers of the Providence Master Plumbers' Association, a body affiliated with a national association. This general association had adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material, which sold to others than members of the affiliated association. The enforcement of this resolution by the officers was so strict that complainants were almost driven out of business after they had refused to join the local association and be bound by its rules. Chief Justice Matteson refused to grant an injunction. He said in part: "The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this:

Was the desire to free themselves from competition a sufficient excuse in legal contemplation for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival and attracting it to himself is an act intentionally done and, in so far as it is successful, to the injury of the rival in his business, since to that extent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition."

A more recent case, with more complication in the facts, is Scottish Coöperative Wholesale Society *v.* Glasgow Fleshers' Trade Defense Association (35 Scottish Law Reporter, 645). Certain butchers of Glasgow were the members of the defendant association; a system of coöperative stores formed the constituency of the plaintiff association. The fleshers set about it to drive the stores out of the meat business. It appeared that the imported meat market was carried on at only one place in Scotland, at the Yorkhill Wharf in Glasgow, where the meats were sold by the importers at auction. The asso-

ciation considered that they would attain their object if they could induce the cattle salesmen who were used to sell the cattle at Yorkhill, to refuse to sell to the coöperative stores. The cattle salesmen yielded to the pressure, and the defendants thereby forced the plaintiffs out of that line of business. Lord Kincairney, who heard the case, did not see anything that could be done about it. "After all, the name does not signify. A conspiracy, combination, or association, is, after all, nothing but a kind of contract. But, assuming conspiracy, it is not easy to see what the first defenders did which could subject them in damages. They were entitled to resolve to abstain from bidding at sales at which coöperative bids were received. It was entirely at their option to do that or not. It appears to me that the fleshers acted within their legal rights. It may be regrettable that they happened to have so much in their power. That is the accident of their position, and of the peculiar character of the foreign cattle market."

The reasoning of these cases, and of the others that are like them, is obvious—too simple in view of the complexity of the problem. It is said that A has a right to refuse

to deal with B, unless he will deal with him exclusively; therefore A and others with him have a right to refuse to deal with B, unless he will deal with them exclusively. So it is said, however outrageous the result, the logic of the law must not be set aside. Underneath affirmation of this sort lurks doubt; for if the result is wrong the course of reasoning must be. There is the intermediate assumption that the individual refusal by a single man is of the same character as a concerted refusal by many men. This may well be challenged as law, since it is contrary to fact. Even if it were in the face of the logic of the law, most men would call this competition unfair. For most men firmly believe in the perpetuation of the open market; and they realize that if a combination may work its will in this way, the end of industrial liberty is at hand.

VI

The true method of approaching this problem, it should be reiterated, is by way of justification; we are not examining absolute rights, but relative rights. This is well put in Delz *v.* Winfree (80 Tex. 400), where

the cause of action stated in the petition was that several persons had induced others not to sell to the petitioner live animals for cash, whereby he was greatly injured in his business as butcher. As to the legality of this, Associate Justice Henry said, in part: "The appellee also asserts the following proposition, which may be conceded to be correct: 'A person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal is based upon reason or is the result of whim, caprice, prejudice, or malice, and there is no law that forces a man to part with his title to his property.' The privilege here asserted must be limited, however, to the individual action of the party who asserts the right. It is not equally true that one person may, from such motives, influence another person to do the same thing."

Granted that we have under discussion a case of pure business motive, not of personal spite, it becomes a question, therefore, what course of action shall be justified, and what methods shall be held to be opposed to public policy. An excellent recent case attacks the problem upon that basis—Bailey *v.* Master Plumbers' Association (103 Tenn. 99). This

was one of the typical cases—the defendants, members of an association with by-laws forbidding its members to purchase from dealers who sold to outsiders, the plaintiff, one forced out of business by this sort of competition. And whether this is fair or unfair competition was again the question. The court—Mr. Justice Caldwell writing the opinion—says in one place: "In our opinion, it does not follow from this undoubted freedom of the individual member and individual dealer that all of the members may, as ruled in those cases, lawfully enter into a general and unlimited agreement, in the form of by-laws, that they, and all of them, will make their purchases from only such dealers as will sell to members exclusively. The premise does not justify the conclusion."

If, then, this is all a matter of justification, the existing law may be explained by saying that perhaps an individual in competition may be allowed to refuse to deal with those who deal with his rival without danger to the industrial order, while certainly a great combination may not be allowed to use the same method without disturbance of the industrial peace. But is the method really the same when there is refusal by an in-

dividual? It seems the real truth that the very concert gives combined action a higher potentiality for harm than individual action ever can have. Formal logic does not now support the minority view that the combination is as free to act in this way as an individual is. And public policy certainly seems to be with the majority view that the individual trader should be protected against the pressure of the combination which is breaking up his business relations with those who might otherwise deal with him. The reality of such oppression carries with it, in most minds, the conviction of the essential wrongfulness of such dictation by the combination.

VII

By some observers of these cases a difference is suggested between the situation just under examination, where the coercion of the combination is exercised upon third parties outside of the combination, and what seems to them another state of affairs where an outside party is injured solely by the pressure of the members of an association upon each other. It is urged here for the last time that what one may do alone, he may join with

others to do. But this is not a safe course of reasoning, as has already been seen. Therefore the cases that present this difference should be scrutinized to see if there really is any such distinction as that which is attempted.

One of the leading cases of those, which was decided for the combination, is Bohn Manufacturing Company *v.* Hollis (54 Minn. 223). It appeared in this case that a large number of retail lumber dealers had formed a voluntary association, by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association had a retail yard; and they provided in their by-laws that, whenever any wholesaler, dealer, or manufacturer made any such sale, the secretary should notify all the members of the fact. The plaintiff, a wholesaler, having made such a sale directly to a customer, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. The opinion of Mr. Justice Mitchell is such interesting reading that another extract may be pardoned: "There is, perhaps, danger

that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, the courts may be led to transcend the limits of their jurisdiction, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, to manage the State. Now, when reduced to its ultimate analysis, all that the retail dealers, in this case, have done, is to form an association to protect themselves from sales by wholesale dealers or manufacturers, directly to consumers or other non-dealers, at points where a member of the association is engaged in the retail business."

Another rather extraordinary case to the same effect is Brewster *v.* Miller's Sons Company (101 Ky. 368). This was a suit against the members of the Funeral Directors' Association of Louisville. The wife of the plaintiff Brewster died; he went to the defendants, C. Miller's Sons, to engage their services for her burial. They refused to act, because, as they claimed, the plaintiff was already indebted to them. The other defendants refused to perform the necessary services because of this claim of C. Miller's Sons that Brewster was indebted to them for previous

services, according to the rules of the Funeral Directors' Association. The court—Mr. Justice Paynter wrote the opinion—could find nothing wrong in this; it said: "If one has, on a previous occasion, received the services of the undertaker, and his material, and has refused or failed to pay the bill, it is certainly not unreasonable to refuse to permit him services. To afford mutual protection against such persons it is not unlawful for the undertakers of the community to associate themselves together and agree to refuse to render a like service to one who has refused or failed to pay such expenses in the past to some member of the association."

VIII

One of the best reasoned cases upon this whole general problem remains to be stated, Martell *v.* White (185 Mass. 255). It plainly appeared in this case that the Granite Manufacturers' Association, of which defendants were members, had a by-law that prohibited under penalty any member from having business transactions with non-members. Most of the customers of the plaintiff were members of the association, and

after some of them had been fined by the association for dealing with him, the rest declined to deal with him further. The opinion of Mr. Justice Hammond in this case is so excellent in its grasp of the general situation, as it stands at the present moment, that it would be well if all of it could be printed here: "Nothing need be said in support of the general right to compete. To what extent combination may be allowed in competition is a matter about which there is as yet much conflict, but it is possible that in a more advanced stage of the discussion, the day may come when it will be more clearly seen and will more distinctly appear in the adjudication of the courts than as yet has been the case, that the proposition that what one man lawfully can do, any number of men, acting together by combined agreement, lawfully may do, is to be received with newly disclosed qualifications arising out of the changed conditions of civilized life and of the increased facility and power of organized combination, and that the difference between the power of individuals acting each according to his preference, and that of an organized and extensive combination, may be so great in its effect upon public and private

interests as to cease to be simply one of degree and to reach the dignity of a difference in kind."

In the latest case in Massachusetts, Davis *v.* The Publishing Company (203 Mass. 470), the matter of combination was reduced to its simplest terms, there being but two in the combination complained of. It appeared from the complaint that the plaintiff expressman had been excluded from the list in the publication of one of the defendants, by the machinations of two of his competitors, the remaining defendants, but Mr. Justice Knowlton said as to the plaintiff—"the gist of the plaintiff's action is the wrong done him by intentionally turning away from him those who otherwise would do business with him." And as to the defendants he said—"their desire to advance their own interests in competition is not a justification for attempting to interfere with the plaintiff's business by misstatements, and the making of a false and misleading publication." The law will, therefore, move against any combination, large or small, which is in any way, directly or indirectly, seeking to destroy the business of a rival by using the force of its organization to drive his customers from him.

IX

Underlying this refusal to justify the sort of competition which is now under discussion is the general public policy against monopolization. It is opposed to present ideals that a combination should be allowed to employ methods which will enable it to gain control of its market. This is the real explanation why the courts, by a considerable majority, have declared that a combination cannot bring its organized force to bear upon an individual rival so as to cut him off from his source of supplies. When it is more or less true that any man may enter any business upon his merits, the perpetuation of the open market is assured. But if men in business are left at the mercy of the predatory trusts, the combinations would practically have a permanent hold upon the industries. And to the majority of men an end of competitive conditions in the ordinary businesses would seem the final catastrophe, beyond which there could be nothing but the horror of anarchy or the hopelessness of socialism. It is because of these perils to society that we are finding to-day such agreement as to the propriety of regulation of the industrial situa-

tion by law. A very great change this is, from the doctrines of *laissez faire* of the early nineteenth century to the principles of state control in this early twentieth century.

NOTE

THE plaintiff thus injured in his business was given a remedy in: Georgia—Brown *v.* Jacobs Pharmacy Co., 115 Ga. 429 (1902); Illinois—Doremus *v.* Hennessy, 176 Ill. 608; Indiana—Jackson *v.* Stanfeld, 137 Ind. 592 (1893); Maryland—Klingel *v.* Sharp, 104 Md. 218; Massachusetts—Martell *v.* White, 185 Mass. 255 (1906); Minnesota—Ertz *v.* Produce Exchange, 79 Minn. 140 (1900); Missouri—Walsh *v.* Assn. of Master Plumbers, 97 Mo. App. 280 (1902); New Jersey—Barr *v.* Essex Trades Council, 53 N. J. Eq. 101 (1894); Ohio—Mattison *v.* L. S. & M. S. Ry. Co., 3 Ohio Dec. 526 (1895); Tennessee—Bailey *v.* Master Plumbers' Assn., 103 Tenn. 99 (1899); Texas—Olive *v.* Van Patten, 7 Tex. Civ. App. 630 (1894); Vermont—Boutwell *v.* Marr, 71 Vt. 1 (1896); Wisconsin—Hawarden *v.* Youghiogheny Coal Co., 111 Wis. 545 (1901).

The defendants were not held liable in: Colorado—Master Builders' Ass'n *v.* Domascio, 16 Col. App. 25 (1901); Kentucky—Brewster *v.* Miller's Sons Co., 101 Ky. 368 (1897); Minnesota—Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223 (1893); Rhode Island—MacCauley Bros. *v.* Tierney, 19 R. I. 255 (1898); West Virginia Transportation Co. *v.* Standard Oil Co., 50 W. Va. 611 (1902).

In certain jurisdictions the decisions are hard to reconcile: England, up to the time of Quinn *v.* Leathem (1901), A. C. 495, was not opposed to such action by a combination (cf. Boots Co. *v.* Grundy, 82 L. T. 769);

but it now seems that the particular issue here involved would fall under the rule of this latest case and be decided against the combination. The same observations apply to Scottish Coöperative Soc. *v.* Glasgow Fleshers' Ass'n, 35 Sc. Law Reporter 645, which was decided for the defendants, while Allen *v.* Flood (1898), A. C. 1, was still good law. New York—The courts, upon the whole, have favored the combination in late years (see Park *v.* Wholesale Druggists' Ass'n, 175 N. Y. I., 1903); but the latest decision is for the individual thus injured, Straus *v.* American Publishers' Ass'n, 177 N. Y. 473 (1903).

CHAPTER VI

CONTRACTS IN RESTRAINT OF TRADE

I

It has been remarked that whenever there is an accepted belief among men that strict adherence to certain policies is necessary for their industrial salvation, that belief has already become a principle of the law. In dealing with the eternal problem of competition and combination, the judges have the same social imagination as other men. And as the most of men still think that competition in general is a good, the most of courts yet consider combination an evil. Whether or not it is true that a contract in restraint of trade is against the better interests of the community, as the law has always held, may be judged from the many and various instances of schemes to control the market related in this chapter.

II

From the Common Pleas in the year 1415 this case is reported: "Writ of debt was

brought on an obligation of one John Dier, in which the defendant declared upon a certain indenture which he set forth, on condition that if the defendant did not use his art of dier's craft within the town where the plaintiff, *etc.*, for a certain time, to wit, half a year, the obligation should lose all force, *etc.*, and said that he did not use his art of dier's craft in the time limited, which he averred and prayed judgment, *etc.* HULL.—In my opinion you might have demurred upon him, that the obligation is void, for that the obligation is against the common law, and by God, if the plaintiff were here, he should go to prison until he paid a fine to the king." From that day to this every contract in total restraint of trade has been held invalid.

Our law has never been free from the fear that such agreements might result in serious disturbance of the ordinary processes of competition. This fear was well founded in ancient times, when the market was small; for England had not yet changed from a local economy, where each community was sufficient to itself, into a national economy which implied interchange of goods between distant communities. It was nearly two cen-

turies before the concession was made that any contracts restraining competition could be legal; but with expanding trade, commercial conditions arose which made it necessary that some distinctions should be made. In Jelliet *v.* Broade, for example (as reported by Noy, page 98), "J sells goods to B for $200, and, in consideration of that bargain, B promises that he will not exercise the trade of a mercer in such a village. But after B uses it there, and J brought an action on the case, and resolved by the court that it well lies, for it was a voluntary promise for a good consideration, and it is restraint as to a place. Otherwise if it had been a general restraint or upon a co-action or without consideration." Partial restraint was thus distinguished from total restraint, and this distinction served for centuries to mark the line dividing what was permissible from what was forbidden.

In the early days in many a small town it was quite possible for one man to control all of a given commodity in his market, which he could then sell again at his own price. So restricted were the sources of supply to a given market in those early times that these offenses constituted real dan-

gers to the local consumers. But with a widening economy these dangers ceased and this law became obsolete as time went on. Practices such as these were indictable offenses in these early times. It was against the public peace that the market should be thus disrupted. Hence, in most of the assizes, inquiry was made if such schemes to control the market were on foot in the community. What was feared at the outset was any reversion to monopolistic conditions by artificial restraints upon what would otherwise be the regular course of the competitive market. To keep that market open the law now exercised every diligence, as the rapid development of special law against certain practices abundantly showed.

It was then that forestalling and regrating became recognized offenses. Forestalling was interference with the course of trade at the earlier stage, where designing persons went out on the roads leading to market and bought whole wagon loads of wheat from a farmer who was bringing it to market, their intention being to resell the wheat in that market at a profit. Similarly regrating was the work of undesirable citizens who went boldly into the market and bought more

provisions than they needed for their own consumption, with intent to sell again in the same market. There were two other offenses of this sort against trade, engrossing and monopolizing, which deserve perhaps more attention, as these engaged the business sagacity and larger capital of the bigger men. Usually, such only could buy up great quantities of a staple to hold until the price should be enhanced or make many forward contracts for the delivery of growing crops. It will be seen presently that this old law against monopolization in all its forms has had renewed significance in recent times.

III

In the earlier cases the policy against any real restraint of trade, and against monopolization in any form whatsoever, was maintained on every occasion, whatever the circumstances. The judges still spoke in uncompromising terms; the time for making distinctions had not come yet. For example, in Claygate *v.* Batchelor (Owen, 143), in refusing to enforce an agreement that one tradesman should not do business in a certain town, Anderson, J., reached the height of

his fulmination by saying that "he might as well bind himself that he would not go to Church!"

In the great Case of Monopolies (11 Rep. 84), Popham and all his court resolved against the Queen's grant: "That it is a monopoly, and against the common law. All trades as well mechanical as others which prevent idleness (the bane of the Commonwealth) and exercise men and youth in labor for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable to the Commonwealth, and therefore a monopoly of them is against the common law and the benefit and liberty of the subject."

Until well toward the end of the eighteenth century our law dealt with restraint of trade in an uncompromising manner. But before the middle of the nineteenth century it had been discovered that the law could not be too arbitrary without hampering business too much; and it was found necessary to moderate it by making certain distinctions. There thus was brought about in various ways enough modification of the primary rule against contracts affecting com-

petition, so that toward the end of the century the generalization might fairly be made that it was only unreasonable contracts which directly suppressed competition which should be held void, while reasonable arrangements which still left the contracting parties a certain independence might be valid. It was by this modern method of making distinctions that it was held in an early Florida case that pilots might make an agreement among themselves that the courts would enforce as to the order in which they should take the station, Judge Baltzell taking occasion to extol modern coöperation as that which "distinguished civilized from savage life."

In the same wise spirit of compromise, Chief Justice Shaw in Massachusetts decided that laborers "could not be prosecuted for merely going upon a strike for higher wages, although the preconcert was admitted." Many other illustrations might be cited, if space permitted, of the reasonable modification of the common law during the nineteenth century until it finally presented a working compromise between the two desirable policies of safeguarding competition and utilizing combination. And this had

come from a general recognition, after mature reflection upon the known course of economic history, that in competition and combination we have two eternal forces, and it should be the object of the law to accommodate them, with due regard to the vital needs of the business community.

IV

An interesting plot in modern times to hold up the market is seen in Pacific Factor Company *v.* Adler (90 Cal. 110). In that case the plaintiff had got an option from the defendant for the delivery of some 200,000 grain bags and was attempting to enforce it. The defense was that the plaintiff entered into contracts with other holders of grain bags in all respects similar to the contract made with the defendant to the amount of 30,000,000 bags, with intent to monopolize the market. Mr. Justice Garoutte affirmed the non-suit, making this general argument against the monopolizing company: "It held the bag market in its hands, for competition was gone, and the price demanded must be paid. These agreements were not entered into for the purpose of aggregating

capital, nor for greater facilities in the conducting of their business, nor for the protection of themselves by a reasonable restraint upon active competitors, but for the purpose of regulating, controlling and withholding the supply of bags, and thereby to take an unjust advantage of the farmers' necessities, by disposing of the fruits of its unlawful labors at an unreasonable advance in price."

Even a modern market may be temporarily disturbed by such accumulation, and the normal price may be decidedly enhanced by such monopolization. Occasionally a case like Wright *v.* Cudahy (168 Ill. 86) appears in our law reports to remind us of the persistence of the policy against monopolization. In that case a pork "corner" was engineered with some success, but the court refused to force one of the parties to divide the ill-gotten gains. Upon the whole those who attempt to corner the modern market usually fail at the very moment of their apparent success. That fate generally overtakes them which almost invariably befalls any one man, however powerful, who attempts to injure all. This law has all but disappeared, as the market has expanded

until it has gotten almost beyond the power of any one man to corner it. But this law remains against aggregations of capital which often are large enough to take control even of the modern market for a time.

V

Upon this vexed question of combination in restraint of trade, one of the leading cases in America is India Bagging Association *v.* Kock (14 La. Ann. 168). The facts, as they appear from the finding of the court, are as extreme as can be imagined. An association was formed of eight firms in New Orleans, holders of large stocks of India bagging, and by agreement the subscribers bound themselves not to sell any bagging whatever for three months, except by vote of the majority. Mr. Justice Buchanan dismissed a suit by the association against a member who sold in violation of the agreement in a peremptory manner: "This is a case which ought never to have come before us. The agreement between the parties was palpably and unequivocally a combination in restraint of trade, and to enhance the price in the market of an article of pri-

mary necessity to cotton planters. Such combinations are contrary to public order, and cannot be enforced in a court of justice."

This is a case of total suppression of trade for the time being; nothing, therefore, can save it from the condemnation of the law. And it is obvious in a case like this how necessary it is to have unequivocal law to deal with such a situation. It is hardly too harsh to brand men, who confederate in this way to withhold all supplies from the market, as enemies to society. The courts properly treat such parties when they come before them as outlaws. Upon the whole, few rules in our public policy have been so thoroughgoing as this against restraint of trade. And it does not change the law if the effects of that agreement may be limited to a certain extent by the competition of parties outside the agreement. It is enough to condemn the agreement, if, as between the parties, the restraint is total. The law considers all contracts between competitors to limit their competition as bad in principle.

The restraint of trade thus is as obnoxious to a modern court as ever, as Tuscaloosa Ice Company *v.* Williams (127 Ala. 110), one of the latest cases, shows. The complaint

recited that by the terms of an agreement between the plaintiff and defendant, the first party was to pay $875 a year and the second party was to shut down his ice machine for five years. The court held the whole contract so clearly bad as to be altogether unenforceable, Mr. Justice McClellan saying: "It tends to injure the public by stifling competition and creating a monopoly. It operated not only to put in the power of the covenantee to arbitrarily fix prices, but directly and necessarily to create a partial ice famine, upon which the defendant company could batten and fatten at its own sweet will. That a monopoly was created is clear beyond all dispute. That ends the case against the validity of the covenant."

VI

Against all real restraint of trade the law is still set; and often it frustrates the plans of the conspirators when it is least expected. Take for an example the lowly case of Chapin *v.* Brown Bros. (83 Iowa, 156). The facts are petty, yet the issue is involved. All that appears is that by an arrangement between the storekeepers in a country town it

was agreed that all of them should stop buying butter of the farmers, except one of them, who should share his profits with them. This deprived the farmers of the benefit of the competition of the buyers, as one sees. Justice Rothrock refused to enforce this contract; he said: "It plainly tends to monopolize the butter trade at Storm Lake, and destroy competition in that business. It is not necessary that the enforcement of the agreement would actually create a monopoly in order to render it invalid, and surely where all the dealers in a commodity in a certain locality agree to quit the business, and the plaintiffs are installed as the only dealers in that line, the tendency is, for a time at least, to destroy competition, and leave the plaintiffs as the only dealers in that species of property in that locality."

A precious scheme is that disclosed in Milwaukee Masons and Builders' Association *v.* Niezerowski (95 Wis. 129). This was an action on a note to which it was pleaded as making out a defense upon grounds of public policy. That the note was given by the defendant, a builder, to the plaintiff, the association, in pursuance of its requirements that every successful bidder for contracts

in Milwaukee should pay over to the association six per cent. of the contract price. The showing of such a scheme was enough for Mr. Justice Pinney: "The combination in question is contrary to public policy, and strikes at the interests of those of the public desiring to build, and between whom and the association or the members thereof there exist no contract relations. While all reasonable stipulations and means to protect labor or trade are laudable, we must hold that the means here sought to be employed are such as the law will not sanction. We must consider what may be done under such an agreement, and the result which it will necessarily produce. As already pointed out, the operation of this combination, under its private by-laws, is to suppress free and fair competition in bidding for contracts, and by delusive and deceptive means members of the association are enabled to exact from owners a higher price for buildings than they would otherwise have to pay."

VII

It will have been noted that in the modern cases the attempt has been to draw the

line between what is unreasonable and what is reasonable. The time has certainly come in this discussion to bring forward instances of what the modern law will permit as reasonable to contrast with the cases of unreasonable restraint which have been cited. It is desirable that men should be free to compete in business; it is desirable also that contracts relating to business should be enforced. There is a conflict of policies here, and some compromise is the only way out. As in the case of most legal distinctions it is only a difference in degree that separates arrangements of the forbidden sort from agreements of the permitted kind. But perhaps it will make the discussion clearer to define by catch phrases the two extremes. What, then, is forbidden is unreasonable restraint—suppression of competition; while what is permitted is reasonable restriction—regulation of competition. Phrases these are—but they may serve to fix the limits of the inquiry.

A plain illustration of the social advantage of the reasonable agreement, in ameliorating competition, is Stovall *v.* McCutcheon (54 S. W. 969), where the court enforced an agreement among the merchants in a certain village to close at 6:30 P. M. on certain

days at certain seasons. The opinion of Mr. Justice White was brief, but to the point: "While it is true that contracts in restraint of trade are to be carefully scrutinized, and looked upon with disfavor, all contracts in restraint of trade are not illegal. The restraint here put is but partial,—very inconsiderable. It is but a few hours, at most, each day, and for three and one-half months, during the extremely hot weather. It has come within the observation of the members of this court that during this season (May 15th to September) many merchants close about 6:30 or 7 P. M. This cannot be held an illegal restraint of trade."

Upon the whole, the courts will go very far to support, as reasonable, commercial agreements which they believe to have been made in good faith, with no idea to control the market. An illustration of this tendency is the leading case of Collins *v.* Locke (L. R. 4 A. C. 674). The agreement there in question was made between four parties then engaged in carrying on the business of stevedores in the port of Melbourne for the purpose of preventing competition. The principal shipping firms were by the provisions of the agreement divided into four sets,

one set being allotted to each party to the agreement, if he can get them; if not, an equivalent was to be given; other ships were to be taken in order of arrival, and no other party was to interfere. The House of Lords made a distinction between these two clauses of the agreement. The division of the work for the regular firms, if the arrangement was satisfactory to them, their Lordships held reasonable. "Each party might in turn derive benefit from this clause, and one of the four firms would always get the profit of the ship stevedored, though the work might be done by another of them. As regards the merchant, also, he can have his ship stevedored by the party whom he may require to do it; at least there is no prohibition against his having it so done." But the positive restraint against working for the occasional ships except in rotation their Lordships held unreasonable. "Such a restriction cannot be justified upon any of the grounds on which partial restraints of trade have been supported. It is entirely beyond anything the legitimate interests of the parties required, and is utterly unprofitable and unnecessary, at least for any purpose that can be avowed."

VIII

This distinction between reasonable and unreasonable restraint of trade goes back to the leading case of Mitchell *v.* Reynolds (1 P. Wms. 181), where far too elaborate tests were given to determine whether an agreement should be considered legal or illegal, the hopeless attempt being made to justify all of the previous decisions, ignoring the fact that the originally absolute rule had at length been modified so as to permit business dealings of certain sorts. The actual decision, however, was clearly sound; and it has been followed in almost countless cases of the same sort ever since. It was that a merchant in selling out his business could agree not to engage in a similar trade within a fair distance for a reasonable time. The policy to make the good-will which a trader has built up a salable asset overbore to that extent the general policy against contracts in restraint of trade. It seems that such arrangements should not be permitted to stand when they are being used by a monopolizing concern to perpetuate its control of the market. There are conflicting authorities on this point, but the law probably is that

such contracts are only permitted on grounds of public policy anyhow; and if they are being used as part of a scheme to monopolize, they should not be enforced.

No scheme to control the market should be allowed to hide itself behind the doctrine of the reasonable character of an ancillary agreement, as it was attempted to do in Arnot *v.* Pittston and Elmira Coal Co. (68 N. Y. 558). This was an arrangement between Pennsylvania operators and New York dealers by which it was agreed that no coal should be sold in the Elmira market except under the provisions of the contract through the dealers, the operators undertaking that no other coal should come north of the state line during the continuance of the agreement. Later the parties fell out, but the court dismissed them all, Mr. Justice Rapallo saying: "Every producer or vendor of coal or other commodity has the right to use all legitimate efforts to obtain the best price for the article in which he deals. But when he endeavors to artificially enhance prices by suppressing or keeping out of the market the product of others, and to accomplish that purpose by means of contracts binding them to withhold their supply, such arrangements

are even more mischievous than combinations not to sell under an agreed price. Combinations of that character have been held to be against public policy and illegal. If they should be sustained, the prices of articles of pure necessity, such as coal, flour, and other indispensable commodities, might be artificially raised to a ruinous extent far exceeding any naturally resulting from the proportion between supply and demand."

IX

One of the most important applications of this distinction between what is reasonable and what is unreasonable remains for discussion—the "factor's agreement" so called. A common case is Clark *v.* Frank (17 Mo. App. 602), where Mr. Justice Thompson said, in passing: "We see no force in the argument that the agreement not to sell the goods at less than the trade price was void as being in restraint of trade, so far as it related to goods which might be purchased of other dealers. If it were void, that fact would not help the defendants, for the plaintiff merely chose to say that he would allow certain drawbacks upon the performance of a certain condition."

Another instance of the factor's agreement of equal importance is Houck & Co. *v.* Wright (77 Miss. 476). The facts here also presented an ordinary business arrangement, whereby the manufacturers of a certain piano made an exclusive agency contract with a certain dealer. It was urged in the case cited that this arrangement, excluding as it did other persons from getting a right to sell this piano in this territory, tainted all the surrounding transactions with restraint of trade. But Mr. Justice Terral was clear that this was not at all so. "The arrangement between Vose & Sons and Houck & Co., is entirely legal. It does not operate to suppress competition, nor to regulate the production or sale of any commodity. As said by counsel of appellant, its purpose is to facilitate and advance the sale of pianos. It is Vose & Sons regulating their own business, endeavoring thereby to sell as many pianos as possible, and on the best terms for themselves and their customers."

X

All of these cases show that, by a well-devised contract, power is often obtained to control even the modern market, wide as it

is. It is the recognition of this possibility that makes the law against the conspiracy to control the market so thoroughgoing. Any scheme to monopolize is therefore illegal, whatever may be its outward seeming. Even the exceptions which have been made to the sweeping policy against all restraint of trade cannot be claimed by those who have a scheme to monopolize on foot. In the case of the sale of a plant to a trust the covenants not to compete cannot be enforced. And in the case of a trust the factor's agreement should not be enforced. Upon this whole matter, however, the operation of the common law, as has been seen, is negative. It denies enforcement to all such arrangements; but it can do little if all within the combination are well satisfied. To be sure, it is the common fate of pools that when some of its members can resist the advanced price no longer they will sell out, knowing that their fellow members in the pool will be without legal redress. But some pools are so successful in getting big profits for all concerned, or their members are so loyal, that no one breaks away, and prices stay up. Then the public needs affirmative law for its protection; and this is the explanation of these

modern statutes, discussed in a later chapter, giving to the prosecuting officers power to initiate proceedings to compel the dissolution of such combinations.

NOTE

OTHER important cases in addition to those discussed in the text-book holding an unreasonable agreement unenforceable are: Leighton *v.* Wales, 3 M. & W. 545 (1838); Oliver *v.* Gilmore, 52 Fed. 562 (1892); Santa Clara Lumber Co. *v.* Hayes, 76 Cal. 387 (1888); Craft *v.* McConoughy, 79 Ill. 346 (1875); Anderson *v.* Jett, 89 Ky. 375 (1889); Cohen *v.* Envelope Co., 166 N. Y. 292 (1901); Barataria Canning Co. *v.* Joulian, 80 Miss. 555 (1902); Central Ohio Salt Co. *v.* Guthrie, 35 Oh. St. 666 (1880); Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871); Fairbank *v.* Leary, 40 Wis. 637 (1876). But see—Perkins *v.* Lyman, 9 Mass. 523 (1813); Manchester & L. R. R. *v.* Concord R. R., 66 N. H. 100 (1889).

Other important cases not discussed in the text holding a reasonable agreement enforceable are: Wickens *v.* Evans, 3 Y. & J. 318 (1829); Nordenfelt *v.* Maxim & Nordenfelt Co. (1894), A. C. 535; Bowling *v.* Taylor, 40 Fed. 404 (1889); Grogan *v.* Chaffee, 156 Cal. 611 (1909); Herriman v. Menzies, 115 Cal. 16 (1896); Willson *v.* Morse, 117 Iowa, 581 (1902); Central Shade Roller Co. *v.* Cushman, 143 Mass. 353 (1887); National Benefit Co. *v.* Union Hospital Co., 45 Minn. 272 (1891); Houck & Co. *v.* Wright, 77 Miss. 476 (1899); Presbury *v.* Fisher, 18 Mo. 50 (1853); Bancroft *v.* Union Embossing Co., 72 N. H. 402 (1903); Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887). But see—Lawrence *v.* Kidder, 10 Barb. 641 (1851); Lufkin Rule Co. *v.* Fringeli, 57 Oh. St. 596 (1898).

CHAPTER VII

MODERN FORMS OF COMBINATIONS

I

NOTWITHSTANDING all the law against agreements in restraint of trade which has just been recited, the present generation has seen in the rise of the trusts the greatest movement toward consolidation which is recorded in economic history. But this consolidation was not accomplished without a reckoning with the law. In the face of this adverse law the ingenuity of attorneys, acting for clients who wished to bring about a community of interests, has been taxed to the utmost; and at best their schemes have proved only temporary expedients. In this era of consolidation there has been a change of base at least four times during this brief period: First, the pool—a direct agreement between the corporations concerned for their joint operation to a certain extent; second, the trust—an indirect arrangement between the

shareholders to control the action of their corporations; third, the holding corporation —a central company to hold the shares of the constituent companies; and fourth, the single corporation, which buys the properties of the combining corporations outright. Despite the many cases relating to these four typical forms of intercorporate relationship, the problem is still, to a large extent, unsolved as to how various corporations may be concentrated under one control.

II

It is hardly fair to the legal profession to say that it entertained a real expectation for the success of any simple form of pooling arrangement during the last two decades. In the face of so much express authority against combinations in restraint of trade, clients must have been advised that to form pools was to run for luck. Perhaps every member would live up to his agreement; but there was no remedy at law if anyone did not. Perhaps the proceeds of the pooling would be fairly divided; but the court would not order an accounting. And experience showed again and again that, without legal

obligation, there were always members in any such pool treacherous enough to break with it. Moreover, there was the corporation law to reckon with, as well as the combination law. It has always been held to be against the policy of the corporation law for corporations to surrender their independence by entering a pool. Although the consequences of this were not quite so dire as in the case of illegal combinations, still no corporation could be held to any agreement of this sort.

The leading case on the general principle against the combination of corporations in a partnership or any other association is Whittenton Mills *v.* Upton (10 Gray 582). In that case the court—Thomas, J.—held that, as a matter of law, a corporation could, under no circumstances, beneficial to it or detrimental to it, and for no purpose, legal or illegal, be a member of a partnership. "The effect of all our statutes, the settled policy of our Legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively, certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation

and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchise should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy."

When, therefore, corporations sign agreements to carry on their business in common, the scheme is always held illegal. This is sufficiently shown by the case of Mallory *v.* Hanaur Oil Works (86 Tenn. 598). This was a "combination syndicate," arranged between four corporations engaged in manufacturing cottonseed oil at Memphis. The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents, and employees selected by them, for the common benefit, the profits and losses of such operations to be shared in proportions agreed upon. In declaring this arrangement illegal Mr. Justice Lurton said: "The decided weight of authority is that a corporation has

not the power to enter a partnership, either with other corporations or with individuals. It is unnecessary to consider this contract as constituting a mere traffic arrangement; for the conclusion already announced that it was an effort to form a partnership, determines that in its scope and effect it sought to accomplish much more than would be understood by the phrase traffic arrangement."

III

Emery *v.* Candle Company (47 Oh. St. 320) is a typical form of pooling agreement. An association was shown in that case which included ninety-five per cent. of the manufacturers of candles in the United States. The members of the association surrendered their freedom of action only to this extent, that they were required to pay into the treasury two and one-half cents per pound on every pound of candles disposed of on their own account. Whether they sold any candles or not, they received a share in the profits of the pool. This plan was thus self-acting; it was to the interest of each member to remain idle when the price was low, to operate only if the price were high. The

expected result followed; the production of candles decreased, the price of candles increased during the whole existence of the association. The court pronounced the arrangement bad altogether: "We are of the opinion that the suit cannot be maintained, for the reason that the objects of the association were contrary to public policy and in no way to be aided by the courts. No recovery can be had except by giving effect to the terms of the agreement. The action is in substance a suit against the association to recover a sum due the plaintiff under the terms on which the association was formed. Its suit is to recover its portion of the ill-gotten gains."

The principal rule against restraint of trade thus remains practically unaffected by any further modifications than those which have been mentioned. Nester *v.* Continental Brewing Company (161 Pa. St. 473) is representative of the class of cases in question. The bill set forth that a Brewers' Association of Philadelphia had been formed under articles of agreement in writing by forty-five brewers of Philadelphia, individuals, firms, and corporations. By the principal section of the agreement each member

of the association agreed not to sell any beer to any new trade, or to any customer of any brewer that belonged to the association. A summary from the opinion of Mr. Justice Sterrett follows: " The test question in every case like the present is whether or not a contract in restraint of trade exists which is injurious to the public interests; if injurious, it is void as against public policy. Courts will not stop to inquire as to the degree of injury inflicted. It is enough to know that the natural tendency of such contracts is injurious. So if the natural tendency of such contracts is to injuriously affect public interests, the form and declared purpose are immaterial. Courts will not lend their aid in illegal transactions no matter how disguised."

It is to be noted again that when a combination in restraint of trade is once proved to be such, outlawry is declared. It can bring no suit against those in it; neither can they sue it. The courts will have nothing to do with association or associates. This is the penalty, that the loss must lie where it falls; and this policy is, in itself, often one of the strongest of deterrents. Thus any member of the association may withdraw

whenever it suits his interest to do so, a result that minimizes the harm that such a combination may effect. For experience shows that the result is that competition still goes on surreptitiously, despite the agreement, since every active member is strengthening his position in preparation for an ultimate withdrawal. And at the psychological moment some member, who has accumulated a large stock while production has been curtailed, will sell out at near to the top price and break the market, thus causing his associates irreparable losses.

IV

Such was the state of the law when the trust agreement was discovered by a startled community. The material features of that scheme are now well known; the first great case on this scheme, People *v.* North River Sugar Refining Company (121 N. Y. 582), brought out the details of the whole matter. All the shares of the capital stock of all of the confederating corporations were transferred to a board of trustees. These trustees issued trust certificates in lieu of these shares, thus reserving the voting rights in all of the

corporations. As a cover for the scheme all of the several corporations remained in existence; and in form each conducted its own business without any cross agreements among themselves. In one of the most perfect opinions in our books Mr. Justice Finch held the trust agreement invalid. He concluded thus: "And here, I think, we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest. It is not a sufficient answer to say that similar results may be lawfully accomplished by an individual. And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having

reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy."

A few years later the suit to dissolve the first of all the trusts, the Standard Oil alliance, was decided in favor of the State. In State *v.* Standard Oil Company (49 Oh. St. 137) the Attorney-General of Ohio commenced this action to oust the defendant of the right to be a corporation on the ground that it has abused its corporate franchises by becoming party to an agreement that is against public policy. The agreement shown in the case provided that almost all the stockholders in the defendant company had transferred their stocks to certain trustees, as had nearly forty other corporations engaged in the same business in pursuance of the same scheme. All of the stockholders of all the companies involved received in return for their shares trust certificates issued by the trustees. The trustees thereupon elected themselves to be a majority of the directors of each of the constituent companies, and thereby controlled the conduct of each, and so of all. Minshall, who wrote the opinion, rested the decision upon broader grounds of

public policy than did Finch. "Much has been said in favor of the objects of the Standard Oil Trust, and what it has accomplished. It may be true that it has improved the quality and cheapened the costs of petroleum and its products to the consumer. But such is not one of the usual or general results of a monopoly; and it is the policy of the law to regard, not what may, but what usually happens. Experience shows that it is not wise to trust human cupidity where it has the opportunity to aggrandize itself at the expense of others. The claim of having cheapened the price to the consumer, is the usual pretext on which monopolies of this kind are defended. It is no answer to say that this monopoly has in fact reduced the price. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. A society in which a few men are the employers and the great body are merely employees or servants, is not the most desirable in a republic; and it should be as much the policy of the laws to multiply the numbers engaged in independent pursuits or in the profits of production, as to cheapen the price to the consumer. Such

policy would tend to an equality of fortunes among its citizens, thought to be so desirable in a republic, and lessen the amount of pauperism and crime. By the invariable laws of human nature, competition will be excluded and prices controlled in the interest of those connected with the combination or trust."

From the point of view of those who had a scheme to monopolize on foot this trust device was excellent. It was centralized in its control and secret in its doings. It left the power of control with the inner circle, while enabling them to market as many securities as they pleased. But after these two decisions it was recognized that it must be abandoned. The case was now hopeless at law. It had been held against the law governing corporations in that it was *ultra vires* for a company so to surrender its independence. It was also a void arrangement by the law against combinations in restraint of trade. The courts looked through the outer forms into the inner facts. All the cleverness that went to form the trust—and all the ingenuity with which it was defended—were lost upon the courts. The possibilities of injury to both public and private interests were too great for the scheme to receive any countenance

from the law. The plight of the minority stockholders was hopeless unless the law should declare the scheme bad; for the trust could close down a plant where there was a large and recalcitrant minority, which would not exchange its shares for trust certificates, until these stockholders were starved out. And from the point of view of the State the scheme was almost beyond control, as its accounts could be juggled, and responsibility for wrong-doing could not be fixed.

V

A transition period of a few years followed upon the dissolution of the trusts. The original owners still had the properties; and the common danger held them together, temporarily at least. Meantime the lawyers were casting about for some new scheme for combining interests which would have legal sanction. The stress of the situation demanded forms of reorganization which would bear the scrutiny of the courts. The first schemes were rather obvious attempts to make use of some established arrangement as a cover from combination. Rather absurd these were, doomed to early exposure from the outset.

For the law making unenforceable contracts which tended to restrain trade could not thus be evaded. What could not be done directly, could not be brought about by any such indirection. The law is not so easy to evade as laymen think, particularly when there is a public policy behind the law.

One of the schemes which was tried out was the making of simultaneous exclusive contracts with a common central agent. In Cummings *v.* Union Bluestone Company (164 N. Y. 401), for example, the principal producers of this stone were combined in an association to regulate prices, while a separate company was made the exclusive sales agent of each participant. The New York court held this arrangement illegal altogether. Mr. Justice Landon said: "The plaintiff urges that it was a question of fact for the jury, and not of law for the court, whether the contract was simply to secure reasonable prices, or to extort from the public unreasonable prices. It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. The scope of the contract and not the possible self-restraint of the parties to it, is the test of its

validity. They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great."

Another scheme, more ingenious yet, was the "dead lease" seen in Clark *v.* Needham (125 Mich. 84). The arrangements made involved two leases, one from the party who was to sell out one branch of his business, absolute in form at a high rental to be paid by the buyer; the other from the buyer back to the seller at nominal rental, with covenants against engaging in that line of business. The court was quick to see through this elaborate plan; Mr. Justice Grant said on that point: "The plain object of the agreement was to substantially close this part of plaintiffs' business, and to give defendants a monopoly of it. The parties evidently recognized the invalidity of such a contract, put in plain and unequivocal language, and sought to evade it by these two so-called leases. The arrangement was a bare subterfuge to evade the law. Such contracts tend to destroy competition and create monopolies, and are void."

It became altogether a question of legality

—which is a thing more desired by the captains of industries than one who reads the sensational magazines might suppose. It is true that without legal sanction much may be done under a gentlemen's agreement; but without legality in organization there is no security. What depends upon individual agreement is subjected to the chances of personality. Nor can there be any permanence unless the arrangement is perpetual, without regard to the death of anyone. And what is of more importance, without security and permanence there can be no issue of securities, or market of them.

VI

Meanwhile the more eminent counsel who had the great interests to advise were engaged in larger plans, more feasible at law because devised with more insight. Their idea was to create a holding corporation, a new central body which should acquire a majority of the stocks of the constituent companies. This scheme suited their clients well; indeed, it was doubtless the clients that decided upon its adoption. For the holding corporation possessed possibili-

ties for manipulation pleasant to contemplate; the marketable issues could be doubled by making the stock of the holding corporation twice that of the constituent companies; and as the operations of the business could be concealed between the accounts of the holding company and the constituent companies, there would be nothing to fear from the publication of formal statements.

There were obviously legal difficulties. In most states by the common law it was beyond the powers of one corporation to hold the stock of another for the purpose of operation, for the reasons advanced in the brief case which follows. Milbank *v.* New York, Lake Erie, and Western Railroad (64 How-Pr. 20) was an action brought by minority shareholders of the Buffalo, New York, and Erie Railroad to restrain the defendant railroad from voting the stock which it had acquired to control the railroad in which the plaintiffs held their stock. Haight, the presiding judge, gave the relief asked, explaining the case thus: "In the case under consideration, the New York, Lake Erie, and Western Company have acquired by purchase the majority of all the stock issued by the Buffalo, New York, and Erie Railroad. If

its officers are permitted to vote thereon, they can elect a board of directors of their own choosing. It would then be for the interests of the New York, Lake Erie, and Western Railroad Company to have the Buffalo, New York, and Erie Company managed and controlled in the interests of the former company. This would be liable to result in injury to these plaintiffs and their fellow stockholders, and if so they have a right to complain."

Although this decision represented the common law, the statute law in some states, and special charters in others, permitted corporations to be organized to hold the stocks of other corporations. This, however, was at best only a solution of one of the difficulties; another remained. Granted that the corporation was enabled to act without violation of the corporation law, there was the combination law still to reckon with. Thus in People *v.* Chicago Gas Trust Company (130 Ill. 268) a corporation organized with power to hold the stocks of gas companies bought at once a majority of all the stocks of the four principal gas companies operating in Chicago. But the court on *quo warranto* held this scheme to be an abuse of the powers granted in the charter, Mr. Justice Macgruder say-

ing: "The control of the four companies by the appellee—an outside and independent corporation—suppresses competition between them, and destroys their diversity of interest and all motive for competition. There is thus built up a virtual monopoly in the manufacture and sale of gas. Whatever tends to prevent competition between those engaged in a public employment, or business impressed with a public character, is opposed to public policy and, therefore, unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy."

VII

All this time it had been recognized that there was a safer way, if one chose to take it. The approved form among lawyers during the last few years for making a consolidation of interests is by the formation of a single gigantic corporation intended to take over, by purchase, all the different concerns that are to be brought together. Several courts have already dealt with the legality of this operation. In Trenton Potteries Company *v.* Oliphant (58 N. J. Eq. 507) a conveyance had been made by the owners of a pottery

business to the Trenton Potteries Company, which carried with it covenants by the sellers not to compete against the business sold. As the good will was included in the transfer, these covenants would be good, if the whole transaction were unobjectionable. The difficulty was that the buying corporation had been formed for the express purpose of taking over various competing plants, and that the object aimed at by the parties was to secure power to suppress competition and to control production. Upon this point Mr. Chief Justice Magie made these observations: "Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are without doubt opposed to public policy. But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to carry on almost every conceivable manufacture or

trade: such corporations are empowered to purchase, hold, and use property appropriate to their business. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns."

This is not unquestioned law by any means. A case directly opposed is Distilling and Cattle Feeding Company *v.* People (156 Ill. 448). This case arose after the reorganization of the Whisky Trust into an operating corporation. The regular forms had been gone through with, and the title to the properties had been duly made over to the new corporation in exchange for the outstanding trust certificates. But the Illinois court could see in this change of form nothing that was substantial. As Mr. Justice Bailey said: "The trust and its operations are to be carried on in the same way, for the same purposes, and by the same agencies, as before. The trust, then, being repugnant to public policy and illegal, it is impossible to see why the same is not true of the corporation which succeeds to it and takes its place. The control exercised over the distillery business of the country—over production and prices—and the virtual monopoly formerly held by the trust, are

in no degree changed or relaxed, but the methods and purposes of the trust are perpetuated and carried out with the same persistence and vigor as before the organization of the corporation. There is no magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons." If this decision be good law, any great corporation can be dissolved by reason of its past history. But even if this can be done, would it not be better to settle the matter upon the basis of its present conduct?

VIII

From step to step in this succession there is a movement toward integration. Now that the end of that economic evolution has been reached in the single corporation, the law against combinations in restraint of trade may perhaps cease to operate. It has done a good work in forcing those who wish to bring together various corporations into greater enterprises to organize in an open manner under the general corporation laws. Now at last

the State may impose such special regulation upon these industrial concerns as the situation requires. The problem is therefore much simplified since the time of the trusts. It has been reduced to the lowest terms by this praiseworthy activity of the law in insisting that all combinations of every stripe should be destroyed. Now that we have the fruits of that first victory in the enforced form of the large corporation, we may hold a council of war during this armistice. Shall these great corporations be destroyed, or shall they be regulated? That, it is submitted, is the trust problem in its latest phase. All of the law for the destruction of combinations in restraint of trade is to a certain extent superseded, because the new monopoly is no longer in the form of a combination. On the other hand, the law for the regulation of businesses affected with a public interest can now for the first time be effectively applied to the whole field of virtual monopoly.

NOTE

As the problems discussed in the text are by no means settled as yet, some leading cases as to each of the four principal types of industrial combination are subjoined.

I. THE POOL HELD ILLEGAL

United States *v.* Trans-Missouri Freight Assn., 166 U. S. 290; Addystone Pipe Co. *v.* United States, 175 U. S. 211 (1899); Getz *v.* Federal Salt Co., 147 Cal. 115 (1905); Leonard *v.* Abner Drury Co., 25 D. C. App. Cas. 161 (1905); White Star Line *v.* Star Line, 141 Mich. 604 (1905); Emery *v.* Ohio Candle Co., 47 Oh. St. 320 (1892); Nester *v.* Continental Brewing Co., 161 Pa. St. 473 (1894); Coquard *v.* National Linseed Oil Co., 171 Ill. 480 (1898).

II. THE TRUSTS HELD ILLEGAL

American Preserves Trust *v.* Taylor Mfg. Co., 46 Fed. 152 (1891); Georgia Trust Co. *v.* State, 109 Ga. 736 (1899); State *v.* American Cotton Oil Trust, 40 La. Ann. 8 (1888); Southeastern Securities Co. *v.* State, 91 Miss. 195 (1907); State *v.* Nebraska Distilling Co., 29 Neb. 700 (1890); People *v.* North River Sugar Refining Co., 121 N. Y. 582 (1890); State *v.* Standard Oil Co., 49 Oh. St. 137 (1892).

III. HOLDING CORPORATIONS HELD ILLEGAL

Northern Securities Co. *v.* United States, 193 U. S. 197 (1904); Standard Oil Co. *v.* United States, U. S.

(1911); Dunbar *v.* American Telephone Co., 224 Ill. 9 (1906); MacGinniss *v.* Boston & M. Copper Co., 29 Mont. 428 (1904); State *v.* Oil Co., 217 Mo. 1 (1909); State *v.* Virginia Carolina Chemical Co., 71 S. C. 544 (1904).

IV. AS TO THE ILLEGALITY OF THE SINGLE CORPORATION

The following cases seem to hold that it is illegal: Distilling Co. *v.* People, 156 Ill. 448 (1895); Attorney-General *v.* Booth, 143 Mich. 89 (1906); National Lead Co. *v.* Grote Paint Store Co., 80 Mo. App. 247 (1899). But the following cases hold it to be legal: Central Shade Roller Co. *v.* Cushman, 143 Mass. 353 (1887); Trenton Potteries Co. *v.* Oliphant, 58 N. J. Eq. 507 (1899); Clancey *v.* Onondaga Salt Co., 62 Barb. 395 (1862); Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484 (1896).

CHAPTER VIII

BUSINESSES AFFECTED WITH A PUBLIC INTEREST

I

THE modern trust will, therefore, soon take the form of the single corporation, dominating its market. Such corporations, however large, will apparently stand before the law as other corporations. There can be no great expectation (even if it were thought desirable) that these great aggregations of capital can be destroyed as illegal in point of organization. But the great corporation with substantial control of its market differs fundamentally from the small one which is simply a factor in competition. Our law from time immemorial has subjected those who had monopoly, whoever they might be, to an extraordinary system of regulation, as compared with the virtual freedom accorded to those who had no control of their market. That great corporations are to play a great part in the industries of this country for an

indefinite future, anyone who has observed the course of economic evolution during the past generation must see. And now that they have arrived at substantial dominance over their respective markets, they should be regulated, as established monopolies have always been regulated. This regulation by law has always been the policy of the State in dealing with any business which has so far attained control of its market as to be affected with a public interest. Indeed, such businesses have been spoken of from time immemorial as public employments; and such public services have always been subject to a special law compelling their proprietors to deal fairly with their public.

II

The mediæval system involved almost universal regulation of all the doings of men, and therefore its commercial policy was almost completely restrictive. The ideal held was a society in which all things were ordered, the full conception being that every man had a right to his place in this established order. This state of affairs was by most men greatly desired. Indeed, a regulated monopoly with the corresponding obligation of public service

seemed in that age, to the great majority of people, far better than an unregulated competition without public obligation. It was thought that things were put in a true balance by requiring each person to perform his part, and allowing no person to interfere with the employment of another. And all of this control of industrial affairs was felt to be ultimately for the benefit of the whole public, who could obtain thereby, without favor, at reasonable prices proper service in accordance with their requirements. Thus the baker and the miller were by the mediæval law bound to serve all that applied, or else they were answerable for it in the courts. Likewise the surgeon and the smith were bound to serve all with due diligence; and so were the barber and the tailor. Innkeepers, carriers, ferrymen, and wharfingers were held to be at the service of the public then as now.

The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions arise, its fundamental principles remain. The early cases which have just been cited are illustrations of this course of events. Barber, surgeon, smith, and tailor are no longer in common calling because the

situation in the modern times does not require it; but innkeeper, carrier, ferryman, and wharfinger are still in that classification since even in modern business the conditions require them to be so treated. With changed economic conditions in modern times, new callings have come into being with such potentialities that this special law has been utilized as never before in regulating them. Indeed, from the point of view of one who believes in our common law, the class of public callings is capable of indefinite extension whenever new conditions bring new employments within its scope. In all times our law has held to the principle that this peculiar regulation was necessary in certain kinds of business. And it depends largely upon the opinion current at the time how far this law shall be extended.

The principle of law which permits the regulation of these callings has never been abandoned, though the conditions calling for its application at various times have greatly changed. Whenever the public is subjected to a monopoly, the power of oppression inherent in a monopoly is restricted by law. Whenever, on the other hand, competition becomes free, both in law and in fact, the

need of governmental regulation ceases; public opinion ceases to demand such regulation, and the law withdraws it. At the beginning of the nineteenth century was the extreme swing of the pendulum. In this fortunate time, when in most businesses the field seemed free to all, the belief was that the ordinary processes of competition would produce with sufficient certainty adequate service at fair prices. But an absolutely free competition is practically an impossible economic condition; and to this men later awoke when, with the growth in the power of the proprietors of the industries, the people still demanded protection from the State in many ways.

As the prevalence of competitive conditions in business limits the application of the principles of public service law, so the prevalence of monopolistic conditions extends their application. Such a change came about in the latter part of the nineteenth century. About a generation ago a change in commercial practice showed with remarkable distinctness the advantage of combination. Great enterprises took the place of small ones, and great enterprises required co-operation and combination. As the people became accustomed to look upon combination

as the price of success, they came more and more to regard it as a blessing rather than an evil; and public opinion has gradually turned away from the individualistic ideal until to-day it has been fairly discarded by the current philosophy. With the principle of combination as the spring of action has come a corresponding need of controlling the action of such combinations for the good of the whole public. As the rights of the individual trader yield to the rights of the great corporation, so in the view of the man of the present day, the rights of the corporation should in their turn yield to the rights of the whole people.

III

The case for State control is plainest in those few utilities where there are natural limitations upon the sources of supply which are essential to the business. This situation in itself gives some degree of monopoly to those who control the sources of supply most accessible to their market, in that it prevents effective competition with the local service. Thus those who control the most advantageous waterpower have a natural monopoly;

and so it seems that they must deal fairly with all to the extent of their undertaking. For the same reason those who have pre-empted the natural gas fields must deal without discrimination with the public which they have assumed to serve therefrom. It would be going too far doubtless, at the present time, to claim that it is accepted law that natural limitation of a public necessity necessarily makes its general sale public employment. So long as those who have virtual monopoly of the anthracite coal fields are left free to charge what prices they please, the principle is in abeyance. And so long as those who have virtual control of the petroleum oil wells are left free to discriminate as they please between their customers, the duty is not recognized. But it may be that in the fullness of time these now all too powerful purveyors to public needs will be brought within this law, and subjected to public regulation.

One of the earliest needs of a community is a supply of water for domestic uses; and it has been always obvious that this is a public utility in a true sense of that term. Said Mr. Justice Lord, in an important Oregon case (21 Ore. 211): "How can the de-

fendant, upon the tender of the proper compensation, refuse to supply water without distinction to one and all whose property abuts upon the street in which its pipes are laid? If the supplying of a city or town with water is not a public purpose, it is difficult to conceive of any enterprise intrusted to a private corporation that could be classed under that head."

An equally plain public service is the irrigation system, so obvious indeed that the propriety of State aid to such an undertaking has never been doubted. In Cummings *v.* Hyatt (54 Neb. 35). Chief Justice Harrison held a taking for irrigation to be a public use: "It must be concluded that it has been established by both legislative and judicial determination that the use, in contemplation of law and designated thereby, was a public one, and with the further considerations that all members of the public within the range of the operations of the work might demand and command service by the company by payment of the usual and customary rates for such service, and that the company was of such a nature as would subject it in its transactions to legislative control,—it was not improperly classed as an

internal improvement and entitled to the rights and privileges of such a work."

IV

Another natural limitation results from the character of the product. If the physical characteristics of the product are such that it can only have a local distribution, the barrier against outside competition may fairly be said to be natural. What, after all, is that element in the situation which makes the sale of gas a public employment, while the vending of candles is a private business? Is it not this—that the box of candles may be sent from any factory into any market, a condition which preserves virtual competition in every market, while a thousand cubic feet of gas can only be got from the pipes of the local company, which gives it control of the situation? The situation is substantially the same as to the distribution of electricity as compared with the sale of coal. Electricity can practically only be supplied from the local wires, even though transmission over considerable distances is now practicable. It cannot be transported independently and stored for

long periods as coal may be. When the market is thus limited by the nature of the product, it may fairly be said that the monopoly of the local company is natural.

It is interesting to note that in the first cases which arose as to the supply of gas, the courts held that the proprietors of a gas works were as free as the owners of any factory to sell gas to some and refuse to supply others. But it was soon seen that the business was one which could not be left without control. It is universal law now that a gas company must serve all who apply. One of the earlier instances of this rule in the United States is to be found in Shepard *v.* Milwaukee Gas Light Company (6 Wis. 539). The plaintiff complained of the refusal by the established gas works to supply him. The defendant claimed that under the circumstances of the case it was not bound to serve the plaintiff. Mr. Justice Smith held that the gas company was bound to sell its gas to every citizen of Milwaukee upon compliance with such regulations only as the company might rightfully impose. His argument was this: "It is sufficient for the purposes of this case to know that the company had the exclusive right to manu-

facture and sell gas, and that hence the only means of supply available to citizens was through the agency of the company. Corporations of this kind are not like trading or manufacturing corporations whose productions may be transported from market to market throughout the world. Its manufacture depends upon the consumption of the immediate neighborhood for its profit and success, and upon no other place. From the nature of the article, the objects of the company, their relations to the community, and from all the considerations before mentioned, it is to me apparent that the company is not at all analogous to an ordinary manufacturing or trading corporation."

It is most significant that no electric light company has ever squarely denied that there rested upon it the primary obligation to serve all. It shows that the law of public service has now such general acceptation that in a new instance where it is obvious it will be applied by the courts without hesitation. In holding for the consumer in an Illinois case (196 Ill. 626), Mr. Justice Carter thus stated the fundamental propositions involved: "There is no statute regulating the manner under which electric light companies shall

do business in this state. They are therefore subject only to the common law, and such regulations as may be imposed by the municipality which grants them privileges. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discrimination. Both reason and authority deny to a corporation clothed with such rights and powers, and bearing such a relation to the public, the power to arbitrarily fix the price at which it will furnish light to those who desire to use it."

V

Another obvious restriction upon effective competition results from limitation of time. When the need of the applicant is immediate, the person from whom he asks service has the upper hand. This monopoly may only be temporary; but it is none the less real. This insistent need for present service largely explains why the innkeeper dealing with the wayfarer, and the hackman bargaining with the traveler, have always been held subject to special law governing their dealings. The weary wayfarer would pay an exorbitant price rather than be turned back into the

night, even although another inn were nearby; and it is notorious that a hackman can extort an outrageous fare from a passenger in haste, although another hackman may be around the corner. It is the instant need also which gives to those agencies established for the rapid transmission of intelligence that virtual monopoly which the telegraph and telephone obviously have. There are other ways of sending communications by mail or by messenger, but they are not effective substitutes.

In the case of the telephone it is shown plainly that there is a common law principle applicable to all businesses which are monopolistic in character. From the first the courts held the business subject to the public service law. Said a Nebraska judge in a leading case (17 Neb. 126): "While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the plant of the respondent, from the very nature and character of the business, gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the

present day make the telephone a necessity. All the people, upon complying with the reasonable rules and demands of the owners of the commodity,—patented as it is,—should have the benefit of this new commerce. The wires of the respondent pass the office of the relator. The relator never can be supplied with this new element of commerce, so necessary in the prosecution of all kinds of business, unless supplied by the respondent."

A fundamental case that comes to mind at this point is the Illinois case (184 Ill. 438) putting the Associated Press in public employment, where Mr. Justice Phillips said: "The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent

of the interest it has thus created in the public in its private property."

VI

The sites upon which certain services can be conducted to best advantage are few in number. The necessity of these locations to proper conduct of the business may be so great that those who are possessed of these sites may well be said to enjoy a natural monopoly, since if others venture to establish themselves at all at such disadvantage, their competition will be comparatively ineffectual. At all events those in the favorable locations could exact higher prices than would be fair, were it not for the fact that the law intervened. Of course the importance of the site depends upon the character of the business. Terminal facilities operated in connection with railway systems furnish the most striking examples of this importance of particular sites. To a lesser extent this is true of those services which although not dependent upon an exact location are operated with peculiar advantage in particular areas, such as warehouses in business districts and cold storage in market-places.

The grain elevator furnishes the principal case upon the subject of the legal regulation of established monopoly. Any discussion of the foundations of our industrial relations must give chief place to the case of Munn *v.* Illinois (94 U. S. 113). Upon the right understanding of this case depends the true conception of our general theory of the function of State regulation. It was in that case that Mr. Justice Waite announced the doctrine of State control over public businesses in language which has been quoted so often as to be familiar to all: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and

must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

Any business which must be conducted within a certain location is thus public in character by reason of this limitation. In the case of the stockyards, for example, its monopoly is largely due to position, as Chief Justice Johnson pointed out in a Kansas case (74 Kans. 1): "Because of the nature of the business and the railroad facilities, the establishment of other markets at or near Wichita is impracticable, and hence these stockyards are, and of necessity will be, the only available place where the breeders, feeders, and dealers of a great scope of country can conveniently market their live stock. The company has, therefore, a practical monopoly of a vast business affecting thousands of people who are almost obliged to deal at that market and at the rates which the company may choose to charge."

VII

Whether the monopolistic conditions found in a given business are permanent or temporary, is the essential question. Where the

monopoly is natural, it is a case for regulation by law. Where the monopoly is temporary, its destruction should be hastened by the law. If this programme is to be adopted the lawyers must be trained to distinguish between conditions establishing that permanent condition of monopoly, which makes State control the better course, and the adventitious corner, where condign punishment of the members of the pool is called for. Other circumstances than natural limitation in its strictest sense inevitably produce monopoly. Economic forces of various sorts may, either singly or in combination with others, naturally result in monopoly. Such, for instance, would be the case in a business where production upon a large scale progressively decreased cost. In such a business it is inevitable that the business will be concentrated in the hands of a few concerns. Such seems to be the case in a high ratio in the petroleum business and in gas supply.

Another usual characteristic of a virtual monopoly is the relatively large cost of the plant. In very many instances this runs high into millions which must be invested before the service can be begun. This necessity of getting together so much capital limits

fundamentally the amount of such construction. Canals and railroads furnish the chief examples of this. It would take perhaps twenty billion dollars to duplicate the present facilities for transportation; and it is, therefore, practically inconceivable that it will be done. Moreover, in most monopolies there is still another reason why capital is kept from investment in a competing service. The capital invested must be sunk at the risk of failure in this one market. For example, an investment made in a foundry or an electric plant cannot be changed. Thus to the enormous cost as a deterrent to competition is added the imminent risk of total loss in a desperate competition in which one competitor must perish.

Still another characteristic of virtual monopoly is that the applicant who wishes an individual service of the kind rendered by the established company is almost always at great disadvantage relatively in supplying himself. It is, of course, rare that the possibilities in any given case will be so restricted that if the applicant is refused service by the particular company no alternative is open to him; usually, in some way or other, he could hit upon some way out in such a

case. But the alternative offered will often be an inadequate substitute, disadvantageous to a greater or lesser degree. In such a situation there is no effectual competition to regulate the action of the original company, and without the interposition of the law there might be great oppression. A farmer, charged an exorbitant price for a harvester, may keep to his scythe, but only at great disadvantage. The mere fact that there are two gas companies in a town is not enough to alter the fact that the situation is essentially monopolistic, for if one may refuse service, the other may also.

The common fact in all the instances of public employment which have been discussed is virtual monopoly. It matters not by what conditions this situation is established. The conditions which may produce virtual monopoly are various; and some of them will suffice alone. The effect of various natural limitations, such as available sources of supply, restricted opportunities of access, limited time at disposal, and difficulties in distribution have just been discussed. But of almost equal importance are other factors producing true economic monopoly by deterring effectual competition, such as the

cost of the plant, the large scale upon which the business is done, the absence of effectual substitutes, and the dependent position of the particular service. With all the factors which may produce virtual monopoly in mind it will be evident enough that in this general situation, however established, there is real danger to society calling for regulation by the State.

VIII

A review of all of the instances of public employment which have thus far been cited in the course of this whole discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes put forward between the undertaking of a public service in contradistinction to the furnishing of a public supply. Now, it is true that most of the cases are cases of service—the railway and the warehouse, for example; but other of the cases are of supply,—the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. It is submitted that any business is made out to be public in character where there is a virtual

monopoly inherent in the nature of things. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature. On the other hand, if effective competition is proved as the regular course of things in a given industry, the law will hold all businesses within it as private in their character. Under our constitutional system a distinction is made upon this line. In the public calling, regulation of service, facilities, prices and discriminations is possible to any extent. Monopolistic conditions demand such policy; and at no period in history has this been more apparent than now. In the private callings no such legislation should be permitted. Where competitive conditions prevail there should be freedom; and at no epoch in our industries has it been more important to insist upon this. But wherever there is established monopoly in a business of public importance at any time and from any cause, the law is requisite that all shall be served on a reasonable basis.

NOTE

A FEW of the now numerous cases are subjoined where public employment has been found after elaborate discussion of the situation: *Waterworks*—Haugen *v.* Albina Water Co., 21 Ore. 411 (1891); *Irrigation System*—Slosser *v.* Salt River Canal Co., 7 Ariz. 376 (1901); *Natural Gas*—State *v.* Consumers Gas Co., 157 Ind. 345 (1901); *Waterpowers*—Sammons *v.* Keirney Power Co., 77 Neb. 580 (1906); *Stockyards*—Wichita Stockyards Co. *v.* Ratcliff, 74 Kas. 1 (1906); *Gas Works*—Opinion of the Justices, 150 Mass. 592 (1890); *Electric Plants*—Snell *v.* Clinton Electric Co., 196 Ill. 626 (1902); *Electric Power*—Jones *v.* No. Georgia Electric Co., 125 Ga. 618; *Telegraph*—Green *v.* Telegraph Co., 136 N. C. 489 (1904); *Telephone*—State *v.* Nebraska Telephone Co., 17 Neb. 126 (1885); *Railroads*—Raleigh R. R. *v.* Davis, 2 Dev. & Bat. 451 (1837); *Pipe Lines*—West Virginia Co. *v.* Volcanic Co., 5 W. Va. 382 (1872); *Saw Mills*—State *v.* Edwards, 86 Me. 102 (1893); *Grist Mills*—Gaylord *v.* District, 204 Ill. 576 (1903); *Docks*—Barrington *v.* Commercial Dock Co., 15 Wash. 170; *Grain Elevator*—Munn *v.* Illinois, 94 U. S. 113.

In the following cases among others, the business in question was held private: *Skating Rink*—Tombler *v.* Koelling, 60 Ark. 62 (1894); *Theaters*—Percell *v.* Daley, 19 Abb. N. C. 301 (1886); *Foundry*—Loan Ass'n. *v.* Topeka, 20 Wal. 655 (1874); *Mill*—Allen *v.* Jay, 60 Me. 124 (1872); *Coal Yard*—Opinion of the Justices, 182 Mass. 605 (1882); *Apartment House*—Davis *v.* Gay, 141 Mass. 531 (1886).

CHAPTER IX

UNFAIR PRACTICES IN PUBLIC CALLINGS

I

ALTHOUGH from the earliest times some restraint has been exercised over such lines of activity as are of vital interest to the public, in recent times there undoubtedly is an increasing need of stricter regulation of those important employments which are affected with a public interest. Indeed, in the case of the public services, their power over all commercial activities has become so apparent that the necessity for the control of that power for the protection of the whole people is generally conceded. Undoubtedly it is now thoroughly understood by all who conduct businesses which are affected with a public interest, that they must not unjustifiably refuse applications for service, willfully neglect to provide adequate facilities, unreasonably demand unusual prices, or capriciously discriminate between their patrons. Nevertheless it is occasionally as-

serted by the managers of a public employment that they may refuse to give service when it becomes necessary to protect their business interests; and more frequently the right is claimed to make differences in their prices in order to promote their business interests.

II

To meet the exigencies of the trust situation at present, positive law is required. Abusing the freedom which those in private business enjoy, those who have had control of the industrial trusts have adopted various policies to force other competitors out of business, which would never have been allowed had the law of public business been applied to the situation. One of the most reprehensible methods of building up monopoly has been by adopting an exclusive policy, refusing to sell to dealers who handled the goods of their competitors. This almost inevitably forces a smaller competitor to the wall. It is true that such competition is not held unfair where individuals only are concerned. But concerted action of this sort, as has been seen, is generally considered to be an actionable conspiracy. In open com-

petition this business policy may be permitted; but when monopoly is present, it becomes too oppressive to be borne. From a business standpoint it may be an effective policy at times to refuse to have any dealings with a customer who persists in patronizing a rival. The employment of such policies is forbidden those who conduct public services largely because in public businesses virtual monopoly is usually present.

In any case of public employment, however, it is really impossible to justify in any way the outright refusal to serve an applicant, who wishes service, on the ground that he is dealing with a rival. One example of this is Chicago & Alton Railroad *v.* Suffern (129 Ill. 274), where the court held that a railroad could not refuse to receive coal from a shipper who had begun to make shipments by another route, basing its decision upon the ground that serious injury would result to the business interests of the people if shippers could be compelled by such arbitrary measures to patronize one railroad to the exclusion of others. As the court said, since fair competition between roads is for the public interest, if a road could do so it could establish the most odious sort

of monopoly. Another leading case is Bennett *v.* Dutton (10 N. H. 481). There one stage line refused to take passengers coming for a part of the way by a rival line; but the court held this to be a plain violation of public duty.

III

It has been pointed out that the power of the trusts to crush efficient competitors is dependent to a large extent upon various kinds of discrimination. It will be profitable to see how the courts have dealt with this sort of thing in the case of the public callings in general, since the establishment of any business as public in its nature depends in the last analysis upon the existence of virtual monopoly. Indeed, the modern rule requiring service to all who apply, without discrimination against any, is founded upon the absolute necessity of preventing those who have control of the market from exercising that power to the disruption of the industrial order.

The promptness with which the courts act in recent years to prevent personal discrimination in the case of an admitted public employment is shown in a decision like Menacho

v. Ward (27 Fed. 529), where Mr. Justice Wallace said of a discriminating rate against those who shipped goods by another line: "Its tendency is to deprive the public of their legitimate opportunities to obtain carriage upon the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between those places. Such discrimination is not only unreasonable, but is odious."

There is a telephone case in South Carolina (61 S. C. 83) where one telephone company made its patrons agree not to use the rival system. One of its patrons violated this agreement; but the court held that his service could not be cut off. "A telephone company," said the court, "would have no more right to refuse service for this cause, than a railway company would have to refuse to transport the goods of a shipper, unless he would agree to patronize its lines exclusively, and not to give any of his business to any competing railway line." The necessity of compelling those in public employ-

ment to serve without discrimination is thus apparent; it is no less obvious in every case of virtual monopoly.

It seems to be an almost conclusive argument for treating as public-service companies all great corporations that have established control of their market, that by no other law than that of public calling can the situation be met. In private calling factors' agreements of this sort are supported, which shows that the present conditions in the conduct of these great businesses have outgrown this law. In public callings every restrictive condition is void; and this points to this law as the way out. In private business this sort of competition is properly held fair; in public business it is properly held unfair. It is the modern desire to protect the small manufacturers from such competition by the large manufacturers. There can be no doubt about this to anyone at all informed of present public opinion upon this crucial question.

IV

Another policy, which is often of such obvious advantage as to be common in ordi-

nary business, is to make lower proportionate rates to larger than to smaller customers, and even occasionally to decline to deal with very small customers, who may be more trouble than they are worth. The latter is a small matter, perhaps, while the former is a matter of great moment to the managers of public services, who may often see the opportunity to get large amounts of valuable business, highly profitable in the aggregate, even at lower proportionate rates, if they can still maintain higher proportionate rates upon the regular business which they get from smaller customers who are not in a position to dictate their terms. It should be obvious that in a public employment all applicants must be served at fair rates, even if in a particular case it is especially bothersome or even particularly expensive.

It is common knowledge that, in the conducting of many large public services, discounts have been made to large customers in order to get their trade and to retain it; and although this practice is not often made public at the present time, still it is the policy sometimes adopted and, when attacked, openly defended. That this policy may be often advantageous in public, as it is in private

business, may be admitted. But it has already been seen that public duties may conflict with business policies; and that such a policy does conflict with public business may be argued from its deplorable results. The undue favoring of large customers will give them such commercial advantages that they will crush out their smaller competitors; and this is particularly true when a railroad company adopts the policy of making lower proportionate rates to large customers as such.

Such discrimination is opposed to a sound public policy. It would build and foster monopolies, add largely to the accumulated power of capital and money, and drive out all enterprise not backed by overshadowing wealth. This was the line of argument relied upon by the court in the leading case of Hays *v.* Pennsylvania Railroad (12 Fed. 309), where the rather plausible scheme was adopted of a sliding scale by which the amount of rebate was graduated by the quantity of freight furnished by each shipper, a scheme which the railroad urged was adopted in good faith for the purpose of stimulating production and increasing its tonnage. But the court said that if the rate was fixed by the business furnished the rail-

way, "the small operator must sooner or later be forced to abandon the unequal contest and surrender to his more opulent rival."

Although this case now represents the great weight of authority, it must be admitted that there is still a respectable minority which holds that lower relative rates may be made to large customers despite the injury which small customers must suffer thereby. In the case of Silkman *v.* Water Commissioners (152 N. Y. 327), for example, it was held that lower water rates might be given to large consumers than to small consumers, the court saying that to make such difference was a "business principle of general application." The courts which take this view profess to limit their doctrine by the qualification that the differences between the rates for large and small customers must not to be unreasonable, but it is difficult to see any standard by which that difference may be tested if it is once permitted; and indeed it may be asserted with confidence that it is opposed to fundamental principles whenever the services to large customers and to small customers are practically identical, as they usually are.

V

In pursuance of the same policy of increasing the total profits by reaching out for additional business, which may be obtained by making concessions from the ordinary rates charged regular customers, many managers of public services claim the right to make special concessions for special kinds of business, in which the ordinary prices could not be afforded. The same argument is made here which is made elsewhere, that handling this additional business will normally tend to the benefit of regular customers, since the additional business, if rightly managed in their interest, will relieve the regular business of a share of the fixed charges. This is the argument the apologists for the trusts make in justifying a lower price for export, which is making the American people so restive.

If public companies may not refuse to deal with persons who want services for one purpose, while they profess to serve others who want the same services for another purpose, it would seem to follow that, in their dealings with their patrons who ask the same service, a public company ought to charge

all alike, without regard to the need they have of the service. It is true that the results are not so deplorable when the discrimination is between patrons who put the service to different usage as they are when the discrimination is between applicants who are competitors; but it is submitted that from a logical point of view there is substantially the same illegality, and from a practical point of view there is much the same injustice. Nevertheless it is strongly urged by the railroad companies, for example, that they should be allowed to make different rates for commodities which are destined for different purposes. It is, again, pointed out that this policy may be necessary in order to get more traffic, and that this by the law of increasing returns may be for the benefit of all concerned.

Moreover, the railroad managers sometimes make here an argument, which they elaborate in other situations, that upon grounds of public policy they should be permitted to make such lower rates as they did in Hoover *v.* Pennsylvania Railroad (156 Pa. St. 220), where they exacted one rate for coal to be sold at retail for domestic consumption and a lower rate for coal to be

used for manufacturing purposes. And, indeed, in that case the court was persuaded that there was a public policy to support such concessions for special purposes, in view of the encouragement given to productive industries by such preferential rates. But despite the economic argument, the legal principle remains that to charge different customers who wish the same service different prices, when there is no difference in the conditions under which the service is rendered, is plain inequality, and therefore outright discrimination.

Singularly enough, this was the basis of the decision in another Pennsylvania case, Bailey *v.* Fayette Gas-Fuel Company (193 Pa. St. 175), which was decided only a few years later. In that case a higher price per cubic foot was charged to customers who used gas simply for illuminating than was charged to such customers as used gas also for fuel. This was properly held to constitute unjustifiable discrimination, and so sweeping was the language of the court as to cover the less obvious case of making different prices for illuminating gas and fuel gas. But it would seem that the discrimination was unjustifiable, since it was not claimed

that there is any difference in the cost of the product to the company, the expense of supplying it at the point of delivery, or its value to the company in the increase of business or other ways.

VI

The law of public calling is thus a solution for the worst wrong in the present situation—discrimination. It is also the way out for the only other element in the situation that is of first importance—extortion. In private business one may demand any price one can get. Not so in public business; there only a reasonable price can be exacted. That there is danger of unreasonable prices in the present situation is quite evident. Control of the market leads to power to put up price; and power inevitably leads to action. No law can effectively deal with monopoly without the right to restrict to reasonable prices; the law governing the public services has that right. The elemental principles thus far noted in the public service law may be summarized as, on the one hand, the right of the company to derive a fair income, based upon the fair value of

the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth. But the public service law has advanced beyond these generalizations, until it has now become a working code.

It will be generally agreed that the law of public calling is dealing with much success with this difficult problem of the determination of the reasonable rate. The scientific nature of the subject is now beginning to be apprehended. Elaborate rules are being framed; for at last the rights of both sides are appreciated. On the one hand the full right of the public to restrict a public service company to reasonable charges is recognized; on the other hand the corresponding right of the public service company to a fair return upon its capital is admitted. The case of Brymer *v.* Butler Water Company (179 Pa. St. 231) shows how a late decision deals with this troublesome conflict of interests. A schedule of rates fixed by a water company came up for examination under a statute which gave the court the power to

revise a water schedule; and the court thus stated the general principles upon which it would proceed in judging the rates the company was charging: "By what rule is the court to determine what is reasonable and what is oppressive? Ordinarily that is a reasonable charge or system of charges which results in a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

The law of public employment is certainly ready to deal effectively with a most dangerour phase of the trust problem. It is common knowledge that in most cases the capitalization of an industrial trust is many times the actual amounts ever invested in the enterprises consolidated; and, indeed, the depre-

ciated quotations show that they are capitalized at many times their present value. This sort of thing would not confuse the Supreme Court of the United States in the determination of the propriety of rates. Smyth *v.* Ames (169 U. S. 466) makes that point clear. In that important case Mr. Justice Harlan said in part: "If a railroad corporation has bonded its property for an amount that may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public."

Plainly there is no safe basis for the determination of the rate except the actual values. It may be urged that the result of this rule will be to give to the public the

advantage of operation under monopolistic conditions, in particular the elimination of the wastes of competition. The reply is that this is precisely the method that should be pursued in dealing with the trust problem. If the state permits monopoly it may demand in return that the monopolist serve at a reasonable price. This has always been the law of public callings when the statement of it is made with discrimination. It will not do for the United States Steel Corporation to demonstrate that its outstanding issues represent no more than the proper capitalization of its proved earning capacity. This argument is too obviously circular, since it very probably would not have this earning power, were it not for its virtual monopoly. It is not an answer for the Standard Oil Company to point to the fact that upon the whole it has not advanced the price of kerosene above the price at which it would have been fixed from time to time had competitive conditions prevailed during the whole period. It is still open to the general public to point to the forty-eight per cent. dividends in the last years, to say that these are the proofs of the contention that, notwithstanding, the price of kerosene has been too high

during the whole period. Under the public service law, therefore, the State could scrutinize the issue of securities by the trusts, and limit the size of their dividends.

VII

It should now be apparent that the fundamental question under discussion is how far public duty must necessarily deprive those who conduct public employments from basing their business policies upon the elementary principle of the law of increasing returns. That the net returns tend to increase with the volume of business in the industrial enterprises under consideration is obvious; and the question is whether a public service is to be permitted without hindrance to shape all things so as to hold its present business, and to add to it. Some managers of public services assert this boldly, and a few say frankly, for example, that they base their rates upon what the traffic will bear, making high charges against business from which high rates can be got, conceding low rates in order to get business which could not otherwise be obtained. Of course this consideration has some place in every philosophy of price-making, but it is

submitted that it is a dangerous principle, which may often operate to the disadvantage of the public where the public interest is involved.

The real truth of the matter seems to be that, while in private business nothing need be considered except the law of decreasing cost, in public business there is the law against discrimination to be reckoned with. As the court said in the case of Tift *v.* Southern Railway (138 Fed. 753) it is no excuse for raising the rate upon a particular article, as lumber, that it will bear the advance; the question is rather what price it is fair lumber should pay in comparison with other commodities. It must be admitted, however, that the view of many economists, that it will be to the advantage of all concerned if railroad managers are permitted to adopt any schedule of rates which will produce the most tonnage, because that policy will by the law of decreasing costs tend with an enlightened management to the lowering of all rates, is occasionally adopted by lawyers, and, indeed, has never been stated more strongly than recently, in the case of Interstate Commerce Commission *v.* The Chicago Great Western Railway

(141 Fed. 1003). But if railway managers are left practically unrestrained by law, it is sufficiently plain that they will maintain a high schedule of rates between localities where they have control of the situation and for valuable goods which will bear high rates, while at the same time making disproportionate concessions from this standard to get business at competitive points or to induce the movement of low grade commodities.

The authorities upon these questions are a seething mass, particularly in the case of railroad rates. The various commissions which are near to actual conditions seem to show a tendency to condemn the fixing of the differing rates between localities and the differential rates between commodities solely by economic principles of demand and supply, the unequal and unjust results of which the courts are apparently too far removed from the vital facts to realize or appreciate. But even in the courts a reaction seems to to be at hand: in the Naval Stores case (118 Fed. 613) the court seemed to be much shocked, at least, by the disproportion between the locality rates there disclosed; and in the Window Shade case (64 Fed. 72) the court considered the proportion to be ob-

served between the rate established on raw material and the rate on the finished product. It is not enough to say that this power to make preferential rates may be used for the benefit of a railway's territory as a whole or the industries of the whole country, the fact remains that it is a power which may be abused. So long as this power is left in the hands of the managers of these great companies without power of review by any authority upon any fundamental principle, it is in the hands of the railroad officials to build up an artificial market where the natural conditions are adverse, or to turn an industrious city into a wilderness again; and, without restrictions by law, it is within their power to protect certain lines of industry and to crush out others. It is believed that these are too great powers to intrust to private hands without governmental control based upon some recognized standards.

All that has been said in this section as to railway rates applies without much modification to trust prices. It has been a common policy with a national trust to lower prices temporarily in particular districts within which competition has appeared. There has been practically no limit to which

price would not be cut in this competitive district to accomplish the ruin of a competitor. And often the campaign would be supported by raising the price in the country at large. Such local discrimination would be held illegal by the law now developing against disproportionate charging. Even at the present time that law has developed enough to declare illegal serving at a loss in one locality, while demanding a compensatory price in another. If the law of public employment were applied to the trusts, therefore, most of the tactics pursued in their predatory campaigns would be held to be altogether illegal. For against discrimination, whether personal or local, the law is now set.

VIII

There is a clash of interests here; and there has been an inclination on the part of those who conduct these monopolistic businesses to contest every issue. This is hardly an enlightened selfishness; for it seems to many who appreciate the temper of the public, that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative

persons who wish the perpetuation of the present condition of individual enterprise. This memorable year has seen the beginning of a great compromise between the public and the monopolies. The Attorney General of the United States has called for the regulation of the trusts by laws similar to those now in force against the carriers; and the chairman of one of the greatest combinations has openly declared that the trusts are ready to accept legislation going even to that extent. Regulation, it is agreed, is the necessary concomitant of monopolization. Those who conduct a business affected with a public interest, it is admitted, may not adopt to the prejudice of the public the business policies which will get them the most. The law, it is conceded, must see to it that the power of the monopolist over the market is not abused. And the industrial wrongs of the last generation, it is recognized, must not be repeated.

NOTE

THE following cases of illegal discrimination will bring the policy out more clearly: Wight *v.* United States, 167 U. S. 512 (1886); Wester Union Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92 (1901); Mobile *v.* Binville Water Co., 130 Ala. 379 (1901); Snell *v.* Clinton Electric Co., 196 Ill. 626 (1902); Louisville & E. St. Ry. Co. *v.* Wilson, 132 Ind. 517 (1892); Messenger *v.* Pennsylvania Ry. Co., 17 Vroom. 407 (1874); Griffin *v.* Goldsboro Water Co., 122 N. C. 206 (1898); Scofield *v.* Lake Shore Ry., 43 Oh. St. 571 (1885); Lorraine *v.* Pittsburg J. E. & E. R. R. Co., 205 Pa. St. 132 (1903); Fitzgerald *v.* Grand Trunk Ry. Co., 63 Vt. 169 (1891).

For the distinction by which differences based upon cost are held justifiable see, among other cases, Wight *v.* United States, 167 U. S. 512 (1886); Savitz *v.* Ohio & M. Ry. Co., 150 Ill. 208 (1894); Root *v.* Long Island R. R. Co., 114 N. Y. 330 (1889); State *v.* Cincinnati, N. O. & T. P. R. R. Co., 47 Oh. St. 130 (1890).

CHAPTER X

ENFORCEMENT OF THE ANTI-TRUST STATUTE

I

It has been seen in the earlier chapters of this book what was the common law for the regulation of combinations in restraint of interstate commerce in recent times. That law was adequate enough on the substantive side,—in its definition of what was legal and what was illegal; but it was too weak on the remedial side,—in that the existing processes had shown themselves wholly ineffectual to deal with the new conditions. It had been apparent for some time that there had arisen in very many of those important industries which purvey the necessities of life, great leaders who, with those whom they had associated with them, were with startling success taking advantage of those economic forces which had long been making for greater concentration. It was just before 1880 that these captains won in their respective industries the battles which

had assured their power. And long before 1890 these new conditions became generally understood by reason of the many abuses of which those who had gained this great power were guilty. The country finally awoke to the fact that these captains of these industries were doing about as they pleased. It was at this critical time that the allied interests insolently challenged the public by the open announcement of the industrial trusts, which have given their name to the whole problem, although these original trusts have long since been dissolved.

II

To the most superficial observers of current events it thus became evident that the very existence of the competitive system was threatened by the industrial reorganization which was being worked out so suddenly. In a great fear that, if this movement should be allowed to gather more momentum, the very foundations of industrial society might be shaken, there was a widespread appeal from all classes for remedial legislation, upon the justifiable ground of the demonstrated inadequacy of the common law to grapple

with the chief offenders. As generally happens under our Federal system, legislation began in the states before the Federal statute was enacted; and as has usually been the outcome, the Federal legislation is more thoroughgoing than in some states, but less extreme than in others. It cannot be denied that in some respects this anti-trust legislation was absolutely necessary, for unless effective processes had been promptly provided, there would have been no way to deal with those commercial brigands who were making further plans for predatory raids upon a helpless population. It has been the fashion of late years to sneer at the anti-trust legislation as the unintelligent attempt of a visionary people who confidently undertook the hopeless task of putting an immediate end to an irresistible evolution by legislative fiat. But in view of the existing conditions it was obvious enough that immediate provision was necessary for the effective prosecution of such extreme cases as should seem to the administration to demand action, so that the situation might not get beyond all control.

This Federal anti-trust law of 1890—the so-called Sherman Act—begins by sum-

marizing briefly what constitutes illegal restraint of trade and concludes by somewhat more elaborately setting forth the new remedies provided. On the substantive side it first declares illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several states or with foreign nations." It next declares against all who shall "monopolize or attempt to monopolize" interstate or foreign commerce. On the remedial side, the act provided two wholly new processes. The first was a special proceeding to be brought under the authority of the Attorney General to have ordered the dissolution of a combination in restraint of trade. The second was a special action for treble damages available to any person injured in his business by the machinations of a combination.

As matters have worked out so far, it is to these new remedies that chief importance has attached. There has been some consideration given to these other provisions, for example the problem whether the statute in thus condemning every contract and combination made void and illegal all arrangements—reasonable as well as unreasonable.

And again, what constitutes monopolizing has been brought up, but not settled. But it is rather those special proceedings, initiated by the Attorney General, to have dissolved the most notorious of the great combinations, which have engaged public interest. It is, therefore, chiefly the story of the progression of these proceedings that will be told here. But, incidentally, reference will be made to the suits that have been brought for treble damages under the other provision, although these have been few, as private citizens have thus far been content generally to leave it to the Government to bear the brunt of working out through the injunction proceedings the real scope of the legislation.

III

The Federal authorities met such serious reverses in the first campaign against the trusts under the Sherman Act that it seemed, for the time being, that the anti-trust legislation was destined to prove wholly ineffectual. The department of justice after some delays picked out two of the most notorious trusts for its first attack—the Sugar Trust and the Whisky Trust. In the proceedings

against the Sugar Trust the E. C. Knight Company (156 U. S. 1) was named first, as its absorption into that trust was of recent notoriety. And the proof adduced was, if anything, too elaborate as to the formation of this combination among the sugar refiners—but very little was brought forward in the direct evidence as to the interstate trade of these refiners. When therefore the Supreme Court of the United States passed upon the case, being necessarily confined to the record submitted, the majority of the court held that, although the combination in the form of a trust was certainly within the terms of the statute, no more appeared upon the record than a restraint of manufacturing thereby. "Commerce succeeds to manufacture, and is not a part of it," said Chief Justice Fuller. And, as manufacturing was of necessity within particular states, such restraint did not fall within the scope of a Federal statute, no restraint of commerce between states being shown. The real truth seems to be that the Government attorneys were no match for the trust lawyers; and the Supreme Court had not as yet learned to appreciate the real scope of the new legislation.

Other proceedings against commercial combinations failed. These "stock-yard cases," as they are known (171 U. S. 578, 604); one against Hopkins as a member of the Kansas City Live Stock Exchange; the other against Anderson, as a member of the Traders' Live Stock Exchange, were substantially similar. The by-laws of both associations disclosed restrictions upon the compensation to be taken. But the Supreme Court adhered to their principle that in order to come within the provision of the statute, the direct effect of the combination must be to restrain interstate commerce. "There must be some direct and immediate effect upon interstate commerce in order to come within the act," said Mr. Justice Peckham. It has since been appreciated that these cases do not really diminish the proper scope of Federal legislation. These cases now stand simply for the proper distinction that those things which only indirectly affect interstate commerce do not fall within the Federal jurisdiction. There have been several examples of this alternative in recent decisions which are generally accepted as entirely sound. But it seemed at the time that the Supreme Court was still persistently refus-

ing to give to the anti-trust statute the expected application.

IV

Strange often are the events by which progress is made. The Sherman Act had thus within a few years apparently been consigned to a subsequent career of innocuous desuetude by the trust lawyers when an industrial crisis suddenly arose in which the aid of the eminent lawyers of this higher coterie was given to the Government side. This railroad strike of 1894 soon threatened a social upheaval. And as conditions grew worse it was felt that only by an appeal to the Federal Government was its course to be stayed. It was under the Federal law that its leaders were seized and its forces finally disorganized. In these Federal proceedings the point was made prominent that unions were combinations plainly designed to restrain commerce between the States, by interfering with the movement of interstate trains. For contempt of an injunction based largely upon the Federal anti-trust statute Debs (158 U. S. 564) went to his spectacular imprisonment. But these proceedings were not confirmed with-

out great argument in support of the jurisdiction of the Federal Government; and in accepting these arguments the courts went far towards holding that any combination whose action really affected interstate commerce was within the Sherman Act.

We are used to this doctrine now, particularly since the case of the boycott against the Danbury hatters (208 U. S. 274); but at the time it seemed the irony of fate that the anti-trust law should thus far be found without effect against combinations of capital, but directly applicable to combinations of labor. There have been other instances where the anti-trust laws have been employed against combinations of labor; and there will be more now that it is appreciated that the thing most abhorrent to the statute is monopolization. For nothing can be more clearly monopolization than the unionizing policies of many of the present unions. To exclude others from a market is the very definition of monopolization; and the unions are more frank in avowing this to be their object than the trusts are. The managers of the trusts make much talk of the savings of large scale production as the basis of their profits, to conceal the fact that much of this profit is the direct result of their

monopoly. The labor leaders say frankly that they must have monopoly in order to get better wages; they seldom argue with conviction that union labor is more economical.

V

The railroad pools were the first commercial combinations to feel the force of the act; railroads, indeed, were indisputably engaged in interstate commerce. The Trans-Missouri Freight Association (166 U. S. 290) was the first to be attacked. This was a railroad pool of the typical sort, providing for a distribution of traffic and a division of its freights upon a *pro rata* basis. Any arrangement of this kind plainly does away with real competition; and as such combinations have always been regarded as illegal at common law, it was plainly right to hold this pool a combination in restraint of trade within the words of the statute. Still the railway bar, arrayed now in behalf of its own patrons, made a desperate attack upon the application of the statute. But the Supreme Court, now become more sophisticated, held that, as the direct effect of this combination was to control competition in transportation between the

states, its continuance constituted a plain restraint of interstate commerce. A little later the case of the Joint Passenger Traffic Association (171 U. S. 505) came on for disposition. The draftsmen of that agreement had seen to it that the pooling did not go so far as formerly, and indeed, out of abundant caution, had put in a clause that nothing therein should be construed as in violation of the anti-trust law. But, as the substance of competition was really touched by the agreement, the Supreme Court said that this pool, too, should be dissolved for its direct restraint of interstate commerce.

In the opinions in these cases the court went much further than was necessary in construing the statute to apply to all arrangements in restraint of trade, whether reasonable or unreasonable. Unnecessary as it was to the decision, Justice Peckham said in the first case: "By the simple use of the term contract in restraint of trade, all contracts of that nature, whether valid at common law or otherwise, would be included, and not alone that kind of contract which was invalid or unenforceable as being unreasonable restraint of trade." Before this dictum was overruled it was destined to cause

the public unnecessary alarm and the court itself much trouble.

VI

At this stage some people may have thought that all the future had in store had been disclosed. It might have been said that proceedings against the industrial trusts would continue to fail, as all the cases against them had already failed, because the Supreme Court would be satisfied with nothing less than the direct restraint of interstate commerce, which could be found in its pure form only in the very conduct of interstate transportation. But closer readers of these decisions would have seen that the current of opinion in the court had now set in a new direction.

At all events this new appreciation by the Supreme Court of the real scope of the Sherman Act was soon made manifest to all in the decision against the Addystone Pipe Company (175 U. S. 211) and the other foundries associated with it. This combination included the principal makers of iron pipe in large sizes between the Appalachian Mountains and the Rocky Mountains. By the rules of the association, no sales could be

made by any member of the association until he had bought the right to do so from the association. These rights were sold over the table at secret auctions, regularly conducted. Did Omaha advertise for more pipe for its waterworks; Omaha was put up at auction. The concern that thus bought the right to sell to Omaha could then charge Omaha any price it pleased. Indeed, other members on request were bound to put in bids higher still. It is needless to say that this pool was a combination in restraint of trade by any test. In view of what had previously been decided, the important question still remained whether the Supreme Court would hold this to be restraint of interstate commerce. But the doctrine which was now laid down by the Supreme Court in the Addystone case was that, as real suppression of previous competition in actual selling across state lines was shown, these facts made out a sufficient restraint of interstate commerce. And the Addystone case thus marks a great advance in Government's offense, especially as, in the course of the final decision, Mr. Justice Peckham said: "Total restraint of trade in the commodity is not necessary in order to render the combination one in restraint of trade."

Since this decision there has been no doubt that whenever those who are engaged in interstate commerce by making a combination substantially put an end to their competitive dealings, this constitutes such restraint of interstate commerce as to be within the Federal jurisdiction. In the Swift case (196 U. S. 375) this was made plain beyond all doubt. To be sure, the decision of this case might seem to a layman to be made easier by the fact that Swift & Company and its alleged confederates admitted by their demurrer all of the sinister acts attributed to them. But granted that these Chicago packers had an arrangement among themselves not to bid against each other in the regular sales at the stock-yards, the question of Federal jurisdiction still remained. And the Supreme Court held that it does not matter that the combination acted within a single state, if that action really suppressed previous competition in interstate trade. Mr. Justice Holmes well brought out the essential point in restraint of trade when he said: "The scheme as a whole seems to us within the reach of the law. It is suggested that the several acts charged are lawful, and that intent can make

no difference. But they are bound together as parts of a single plan. The plan may make the parts unlawful."

It makes no practical difference whether you say baldly that the Knight case has really been overruled by the Addystone case, because the court has acquired a new point of view, or whether you say that it is the prosecuting officers who have learned, as this case of Swift & Company has abundantly showed, how to present their case so as to bring an industrial combination within the Trans-Missouri case. The real truth is that all concerned have been greatly influenced by the indignant opinion of an outraged public, for ordinary laymen could not but feel that the anti-trust statute was inexplicably nullified if it could reach various offenders, but never the trusts themselves.

VII

The law against the earlier forms of combination without central incorporation, therefore, can be considered settled. But the great problem remains whether these newer forms which have central incorporation should be held legal. Such a combination was destined

soon to be tested by the organization in 1901 of the Northern Securities Company of New Jersey to take over the majority of the stocks of the Northern Pacific and the Great Northern after the bitter campaign of that year in the stock market. This is no place to retell the story of that bloody campaign for the control of the borderland between the Hill territory and the Harriman territory which terminated in this treaty of peace. The outcome is too recent history to require restatement. In the Northern Securities case (193 U. S. 197) the Supreme Court ordered that the New Jersey holding corporation should divest itself of its holdings of these stocks of these railways, as the holding was in violation of the Sherman Act. And in the Harriman case (197 U. S. 244) the Supreme Court ordered that the Northern Pacific shares should be distributed *pro rata* to the stockholders in the Northern Securities Company, thus giving the final victory to the Hill allies.

The decision in the Northern Securities case was a peculiar one. Four of the justices thought the holding scheme wholly bad; four thought it no violation of the Sherman Act. Mr. Justice Brewer held the balance of

power, taking the position that the arrangement was bad as involving total suppression of competition, but saying clearly that, if the scheme had been a reasonable one, it would not have been within the prohibition of the act. Thus the Northern Securities case was the handwriting upon the wall. All who could have read its message must have seen that the Federal Government was now given full power under the Sherman Act to deal with any combination unreasonably restricting interstate commerce. After the Northern Securities case it must have been plain what the outcome was to be as to any form of combination designed to suppress competition. The Addystone case had shown that the Sherman law applied to the case of an industrial combination engaged in interstate commerce as much as it did to a railroad pool, such as was held illegal in the Trans-Missouri case. The Northern Securities, having settled the matter for interstate traffic, was consequently a direct precedent for condemning such a holding scheme as the combination by which the Standard Oil concern restrained interstate trade. Although there are many laymen and lawyers who have inveighed against the Northern Se-

curities decision, and all that it may work, still the weight not only of public opinion but also of legal acceptation seems to be with it, and what it fairly means. The sudden elimination of existing competition, without asking leave of anybody, which the holding corporation brings about, is still regarded by the mass of men as a social danger. Moreover, from a technical point of view, the Securities decision appeals to the majority of lawyers, although there are various dissenters. Indeed, to a reflecting lawyer the decision against the holding corporation logically follows from the decision against the trust arrangement. For in both the salient fact is that former competitors, still existing, are now bound together so that they will no longer compete. It will not do to tell courts which look into the substance of things that there is no direct contract between these constituent companies. The fact remains that the scheme complained of makes them substantially participants in a combination. This constitutes an overt combination suppressing competition, notwithstanding that the combination is the work of an intermediate corporation.

VIII

To one writing of the history of this long campaign against the trusts in this present year, the previous decisions which have just been detailed seem all to be leading up to the great Standard Oil decision, just announced after long consideration by the Supreme Court in the last term. In the Standard Oil prosecution there was shown such a combination as to eliminate all possibility of competition. Indeed, through the New Jersey holding corporation all of the operations of the constituent companies were so centralized that the business was conducted practically as that of one concern with divers departments. It is needless to rehearse the facts. Every reader of our periodicals knows more about the rise of the Standard Oil Company than of that of any dynasty in all history; and, indeed, the rise of the Standard Oil Company is one of the most interesting stories in economic history. Despite all that was said in its behalf, the Supreme Court was unanimously of the opinion that its organization was in flagrant violation of the Sherman Act. Hitherto the Standard Oil concerns have survived litiga-

tion in some form or other, but now without the consent of the law this combination cannot any longer perpetuate its monopoly as its designers planned it.

The most important point in the decision was the insistence upon the doctrine that notwithstanding the sweeping language against schemes to restrain trade in the Act, it is only unreasonable restraint that is meant. This is but following the well recognized canon of statutory interpretation that, in construing a statute using common law phrases, these shall receive their common law meaning. Now, the common law against restraint of trade, from time immemorial, as has been seen, has distinguished between undue restraints and reasonable arrangements. As the Supreme Court now appreciates, it should have thus construed the Sherman law from the outset.

In the Standard Oil case the Supreme Court (all but the radical Harlan) frankly disavowed this dictum in wise and statesmanlike language sanctioned by every principle of law and justice. "Not specifying but indubitably requiring a standard," said the Chief Justice, "it follows that it was intended that the standard of reason which

had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

The Standard Oil case thus will stand in the history of this long campaign against the trusts as establishing the sound doctrine of reasonableness. By the enforcement of this standard the "good" trusts may ultimately be separated from the "bad"; for there is a long course of judicial decisions dating back to the mediæval year-books distinguishing illegal restraint from reasonable arrangements. Those who have faith in the essential justice of our common law will wish no amendment of the Sherman Act, now that it has adopted the common law standard.

IX

In the later Tobacco decision of this memorable year, we have a fuller revelation of the new trust policy. What is in violation of the trust law is now become a question of sub-

stance rather than of form. Mere combination is no longer wrong in itself—it is monopolization which the law seeks to prevent. Those who are enlarging their business in normal ways need no longer fear the trust law; it is the abnormal policy of driving others out of the business which must be abandoned. As the Supreme Court has just said, in view of the general language of the statute and the public policy which it manifests, there is no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason as the standard renders it impossible to escape by any indirection the prohibitions of the law. We are to be governed by this rule of reason thenceforth in any judicial determination as to the character of any combination the legality of which is brought in issue.

As for the Tobacco Trust itself, it would be hard for anyone not retained by it to defend its practices so often laid bare in contemporary litigation. Its history is one of combination upon combination, of scheme after scheme to secure its market and that of its competitors by fair means or foul. It was the undoubted policy of those who were in

control to make it impossible for anyone else to do any considerable business in their territory or within what they considered their sphere of influence. Smoking tobacco and chewing tobacco, cigarettes and cigars, stogies and snuff, tinfoil and licorice—they bought out the principal companies engaged in these lines and forced out the others. The most ruthless of their policies was their insistence upon exclusive dealings; they would often practically refuse to sell their long-established brands (which a retailer must have in stock) to any dealer who carried the goods of a competitor.

Again, if they decided to enter a new field, as when they took on plug tobacco, they would not hesitate to lose millions in underselling to accomplish the ruin of those recalcitrant firms which would not come in. The tobacco decision at least teaches what practices to avoid. People who have still the older notion of industrial freedom may not be shocked by this recital. But according to modern ideas such predatory tactics are punishable offenses against the industrial peace. Such schemes conclusively establish the deliberate purpose to restrain the freedom of a trade by monopolizing it. And it

is against such monopolization that the trust law is to be directed primarily henceforth.

There is always some feature in every noteworthy case which prevents one from saying that no more was decided than could have been predicted. In the Tobacco case this surprise comes in the final decree. The Supreme Court directed the court below to hear and advise the parties to the combination for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and re-creating out of the elements now comprising it a new condition, which shall be honestly in harmony with and not repugnant to the law as declared by the court. This order is undoubtedly the salient feature of the Tobacco decision. It is most unusual for courts to undertake to show parties how they may conform with the law; but destructive measures are giving way to constructive policies. One must not, however, expect too much; there must be other decisions before we shall know with real certainty what is reasonable and what is unreasonable. But by adopting this policy of taking charge of the reorganization, the courts will let us know what their distinction

is to be years before we could know it through the ordinary course of decisions.

X

The Supreme Court has therefore promised us that we are to have the rule of reason henceforth in enforcing the anti-trust law. Very probably we shall have more legislation on the subject of the trusts, but the lines upon which this legislation will proceed have been laid down by the courts already. Federal registration or incorporation, if it comes, will simply protect a trust in acting reasonably. Federal control or regulation, if it comes, will see to it that the good trusts are not punished with the bad. The proof that this is a practicable programme may be found in the fact that the Supreme Court has from the beginning acted upon this principle, while professing up to this year not to be free to be reasonable in enforcing the law. The Supreme Court has never decided against any combination which the great majority of people have not felt deserved its fate. The Trans-Missouri Freight Association, the Addystone pipe pool, the Northern Securities Company, the Chicago

packers, the railway strikers, the Federated boycotters—one and all so defied public opinion that few persons could be found who would defend their conduct as reasonable. In ordering the dissolution of Standard Oil and American Tobacco this year, the Supreme Court has simply passed sentence on two of the most notorious offenders against our industrial peace, long ago found guilty by the country. If, then, the Supreme Court has in fact only decided against the most outrageous trusts in the past, need any concern which is acting reasonably have fear in the future?

NOTE

THE discussion in this chapter has been confined to United States Supreme Court cases under the Federal Anti-Trust Law. Certain cases in the Federal courts which never reached the Supreme Court are too important to ignore altogether. Such as: American Biscuit Co. *v.* Klotz, 44 Fed. 721 (1891); United States *v.* Jellico Coal Co., 46 Fed. 432 (1891); United States *v.* Patterson, 55 Fed. 605 (1893); Chesapeake & O. Fuel Co. *v.* United States, 115 Fed. 610 (1902).

The cases under the State anti-trust laws have been quite similar to those under the Federal law. See—Chicago Coal Co. *v.* People, 214 Ill. 421; Beechley *v.* Mulville, 102 Iowa 602 (1897); State *v.* Phipps, 50 Kans. 609 (1893); State *v.* Fireman's Fund Ins. Co., 152 Mo. 1; Fire Ins. Co. *v.* State, 75 Miss. 24 (1897); People *v.* Sheldon, 139 N. Y. 251 (1893); State *v.* Buckeye Pipe Line Co., 61 Oh. St. 520 (1899); State *v.* Virginia-Carolina Chemical Co., 71 S. C. 544 (1904); State *v.* Witherspoon, 115 Tenn. 138 (1905); Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1 (1898).

CHAPTER XI

RELIEF AGAINST PREDATORY COMPETITION

I

Our law reports during the last two decades have furnished us abundant evidence of the industrial wrongs that the trusts are perpetrating. What those who bear the brunt of these new conditions feel most strongly is the discriminations that these great corporations make in their dealings. These predatory raids which the robber trusts make into the field of peaceful competition raise the chief outcry against them. And this just complaint will not be stopped by pointing out that this sort of thing has been done all along by men in ordinary businesses, and has not been held unfair. This may be said to be the most important of the recent discoveries about the potentialities of the trusts, that a course of dealing which was fair enough in carrying on the former smaller businesses is essentially unfair in the conduct of the later larger businesses. This is the real

explanation of the cases which have already been considered to some extent, which protected an individual trader against the aggressions of a combination that brought coercion to bear upon his customers. To be sure, in competition between individuals it was held permissible to threaten a customer that, unless he gave his trade exclusively, he would not be sold anything. But for a combination to make the same statement to customers was held to be a legal wrong by the majority of cases. Back of all the technique employed to explain these cases, lies the idea that it is essentially wrong to abuse monopolistic power in any such manner.

II

In view of the authorities, it may be predicted that the courts are going to do something to protect the individual in business from such competition by such combinations. The will to do this was seen in People *v.* Duke (44 N. Y. Supp. 336), where a lower New York Court held that the group of men who were in control of the American Tobacco Company could be held guilty of criminal conspiracy, if it could be shown that they were attempting to monopolize the tobacco busi-

ness by coercing and compelling dealers and jobbers to deal exclusively in the goods of their company. Upon the general issue Judge Fitzgerald said: "A trading corporation is entitled to all the advantages it can secure under fair and free competition, but its officers and agents may become criminally liable if they confederate to secure a monopoly by threats and menaces directed against competitors, to force and coerce them to relinquish the rights to the fullest enjoyment of which all are entitled. If, then, the proof in the case at bar should establish the allegations of the indictment, might not the refusal to sell to jobbers and dealers except upon the required conditions, be properly found to constitute menace, coercion, and intimidation? And if such methods or devices were resorted to by defendants to restrain lawful trade and commerce, and create a monopoly, are they not guilty of conspiracy?"

In Massachusetts recently legislation was passed making it a criminal offense to make it the condition of the sale of goods that the purchaser should not sell or deal in the goods of any person other than the seller. In holding this restrictive legislation to be

within the police power (Commonwealth *v.* Strauss, 191 Mass. 545), the Chief Justice of Massachusetts said, for his court: "We may infer that the Legislature was providing for cases in which this particular kind of contract would be unfair competition as against weaker dealers, and would be injurious to the public as tending to crush ordinary competitors, and thus create a monopoly, from which the community as consumers would ultimately suffer. If, at the time of the enactment of this statute, there were dangers of this kind confronting the people of this Commonwealth, and if this prohibition is a reasonable way of averting such dangers, we find justification for the legislation unless it involves a serious injury to those who are restrained by it."

III

The Federal Anti-Trust Law, as will have been noted, declares against two kinds of industrial wrongs, which it is very difficult to separate, as they commonly appear together. Not only does it declare against combination in restraint of trade, but also, if its clauses be sufficiently analyzed, it will be seen that

it declares against monopolization by anyone. The emphasis was formerly placed upon the first of these sections, but now it has apparently been shifted to the second. Perhaps this will finally result in showing that the statute is in true balance, the restraint of trade necessarily involving monopolization. It is restraint of trade that the law declares against. The act has nothing to say against the mere curtailment of competition.

Monopolization was adverted to by the Supreme Court in the famous Wallpaper case of a few years ago (212 U. S. 227). The Continental Wallpaper Company, it appeared, had concentrated into its control all the business of more than thirty wallpaper concerns producing upwards of 98 per cent. of the wallpaper in the United States. To perpetuate the monopoly, which had thus been acquired, all jobbers in their purchases were virtually compelled to sign a jobbers' agreement which bound them to buy from the Continental Company all the wallpaper they should handle at certain prices, and not to resell except on certain conditions. If the jobber should not buy of others, and should adhere to the conditions named, he would get a rebate from the purchase price originally

charged, so startling a reduction as to make it plain that the original price was a fictitious price, and the loss of the rebate virtually a penalty for breaking away from the monopolistic scheme. The Supreme Court would not therefore hold a jobber to the contract price for goods sold him, Mr. Justice Harlan summarizing the reasons of throwing it out of court briefly: "The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, so far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the rule long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought perhaps to pay, but for which he is unwilling to pay."

In the Standard Oil case of this year, the Chief Justice in his opinion has made it plain that the Supreme Court believes that both of the principal sections of the Sherman Act are to be taken together, the first clause against combination and the second clause against monopolization. The second section he says was intended to supplement the first, and to make sure that by no possible guise could the public policy embodied in the first section be evaded. Having in the first section forbidden all means of restraining trade, the second section, according to the Chief Justice, seeks, if possible, to make the prohibition of the act the more complete by embracing all attempts to reach monopoly, even though the acts by which such results are brought about be not embraced within the general enumeration of the first section. "And it is worthy of observation," continues the Chief Justice, "that although the statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless, by the omission of any direct prohibition against monopoly in the concrete, it indicates consciousness that the freedom of

the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it, and no right to make unlawful contracts having a monopolistic tendency were permitted."

IV

To what extent this regulation by law should go is indicated by the great abuses of their powers which the cases which have been decided have disclosed. It is plain that the law is primarily directed now against exclusive policies. For example in the case of Montague & Co. *v.* Lowry (193 U. S. 38), the Supreme Court confirmed a judgment for treble damages in favor of a dealer in tiles who had been greatly injured in his business by the machinations of a dealers' association, membership in which was refused him. It appeared that this dealers' association had adopted the policy of refusing to sell to any dealers not members for less than the retail

price, while the manufacturers of tiles associated with them agreed not to sell to persons not members at any price. As the court pointed out, this was not the simple case of a refusal to deal with a customer, it was the action of a combination bent upon perpetuating its monopoly by bringing pressure upon others to prevent them from dealing with a rival dealer. The object of what was done was plainly to gain monopoly by excluding others. And for the disastrous effects of this policy to the business of the independent dealer the court held he had legal redress.

In the Patent Medicine case, recently decided by the Supreme Court (220 U. S. 373), this point is even more strongly made. There was shown in evidence in this case a system of contracts between manufacturers of patent medicines and wholesale and retail dealers, by which the manufacturers planned to control the prices at which the medicines should be sold at wholesale and at retail, so that there would be no possibility of price cutting at any stage. As an aid to the maintenance of the prices thus fixed the company devised a system of tracing and identifying through serial numbers each wholesale and retail pack-

age of its products. The Supreme Court, being convinced that the various contracts were all parts of a general scheme to destroy competition, held that the contracts were voidable at the option of a dealer who had bought the goods with the agreement to maintain the price named. Once the product is sold, said the court succinctly, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic.

V

Two cases in the state courts of late will serve to bring out the present unfairness in the trust competition in a striking way. In Standard Oil Company *v.* Doyle (118 Ky. 622) there were extraordinary allegations of unfair competition made by a competitor of the Standard Oil Company against it. He alleged that, after he had successfully established a local business, a special representative of the company was sent to destroy it. A local wagon line was established; and the drivers of these wagons were apparently instructed to follow the wagons of the independent concern, the drivers of the Standard wagons even following the other drivers into

the houses and stores where the independent concern was selling, offering to sell oil and gasoline at reduced rates or practically for nothing. Moreover, threats were made against customers of the independent concern that they would be put out of business if they continued to deal with it; and various other methods were employed to destroy the credit of the independent concern and estrange its customers. In holding this to be unfair competition, Mr. Justice Nunn said: "It was most assuredly unlawful to obstruct, harass, and annoy appellee's employees when engaged in the discharge of their duties in selling and distributing oils to appellee's customers; to threaten customers of appellee to shut them up in their business if they continued to deal in appellee's oils; to cause and procure false and injurious reports concerning appellee and his business to be circulated in Lexington and vicinity; and to procure appellee's arrest and prosecution on false charges in connection with his business in the sale of oils, the purpose of estranging and alienating the acquaintances, customers and patrons of appellee." There is too much on the records of courts against the Standard Oil Company to let one believe all its protesta-

tions of the advantages of a benevolent despotism.

In Cilley *v.* United Shoe Machinery Company (152 Fed. 726) it was alleged that this corporation was monopolizing the shoe machinery business of the United States by compelling shoe manufacturers throughout the United States, in leasing shoe machinery from it, to agree to use no other shoe machinery in their respective factories except that made by it. Cilley further alleged that he was the manufacturer of a certain machine used in making shoes, but that by reason of these exclusive contracts manufacturers throughout the United States who would otherwise have bought from him were prevented from doing so. He urged that he had been thus deprived of the open market to which he was entitled as the maker of a meritorious machine; and he asked damages for this loss of business and depreciation of his property. The Federal Court unfortunately did not discuss his complaint on its merits. It was thrown out of court primarily because the complaint was not sufficiently definite. That this controversy between this corporation and its competitors is settled, no one really believes who follows the current news.

VI

It is sufficiently plain that dealers who are damaged in their business by the exclusive, or rather excluding, policies of the trusts may bring action against these combined concerns for the recovery of such damages so inflicted. One of the most striking cases of this under the state anti-trust laws is Cleland *v.* Anderson, a Nebraska case (66 Neb. 252). It appeared in that case that a lumber dealer had been driven out of the lumber business by force of threats made by members of a lumber dealers' association to wholesale lumber dealers, of whom this particular dealer had been purchasing. It appeared that the principal idea in maintaining this association was to prevent the members of the association from being subjected to competition from dealers who were not members. And it further appeared that the wholesale dealers made " honorary members " were subjected to fines if they sold to retailers not " regular." In holding that the attack of this combination upon the dealer constituted a legal wrong for which recovery could be had under the statute, Pound, Commissioner, said: " Combinations and conspiracies in restraint of

trade are unlawful and actionable at common law, and it has been held that combinations between independent dealers which have the effect of preventing competition are within that rule without regard to what may be done in pursuance of them, and although the object is merely to protect against ruinous rivalry without any attempt to charge undue and excessive prices. While persons have a right to withdraw their trade from whom and as they please, they have no right to unite in restraint of competition; and when they go beyond mere withdrawal of business and employ coercion or intimidation to prevent free dealing a different question is presented."

A strong opinion to the same effect was recently handed down in Illinois: Purington *v.* Hinchliff (219 Ill. 159). In this case a manufacturer and dealer in bricks was injured by the operation of an agreement between a brick manufacturers' association, a builders' association and a bricklayers' union, that they would not use, purchase, or lay bricks made by any concern which had not subscribed to the rules of the builders' association. In holding this to be an unlawful conspiracy against this manufacturer, Mr. Justice Wilkin said: "No person or combination of persons can

legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained. All parties to a conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done pursuant to such conspiracy and for the subsequent loss, whether they were active participants or not."

VII

If the present emphasis upon monopolization as the gist of the wrong continues, the law will very probably, in distinguishing between what is unreasonable and what is reasonable, take the distinction which has been established in Rhode Island. In that state the whole law turns upon whether monopolization is shown or not. This court said recently in the Coal Case (29 R. I. 254): "Although the list of common-law offenses in this State may be said to include that of engrossing, our history does not disclose any prosecutions made thereunder; it may therefore be considered as

dormant, but ready to be called into activity whenever the occasion may require. When it becomes necessary, the law relative to engrossing in this state will be applied, with due regard to the circumstances and conditions existing at the time of its enforcement. The danger to be apprehended from engrossing is monopoly. A monopoly, as now understood, "embraces any combination the tendency of which is to prevent competition in its broad and general sense and to control prices to the detriment of the public."

But the court approved the language of an earlier case (18 R. I. 484) where it was insisted that monopolization must be shown: "Undoubtedly there may be combinations so destructive of the right of the people to buy and sell and to pursue their business freely that they must be declared to be void upon the ground of public policy. In such cases the injury to the public is the controlling consideration. But it does not follow that every combination in trade, even though such combination may have the effect to diminish the number of competitors in business, is therefore illegal. Such a rule would produce greater public injury than that which it would seek to cure. It would be imprac-

ticable. It would forbid partnerships and sales by those engaged in a common business. It would cut off consolidations to secure the advantages of united capital and economy of administration. It would prevent all restrictions and exclusive privileges, and hamper the familiar conduct of commerce in many ways. There may be many such arrangements which will be beneficial to the parties and not injurious to the public. Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good. But combinations for mutual advantage which do not amount to a monopoly, but leave the field of competition open to others, are neither within the reason nor the operation of the rule."

VIII

Despite the protests of the managers of the trusts, that prices have been lowered under their auspices, there is a growing suspicion of overcharging. At all events it would be comforting to believe that the law could reach outrageous cases of overcharging. On this point there is a significance in the decision of the United States Supreme Court in Chattanooga Foundry Co. *v.* Atlanta (203

U. S. 390) which has not generally been appreciated. In that case it was held that the city could recover from the foundry the amount it was compelled to pay the foundry for iron pipe above what it was worth. The purchase was made, after a simulated competition, at a price fixed by the trust of which the foundry was member. It was held that the loss to the city was within the Sherman Anti-Trust Law. Said Mr. Justice Holmes, "A person whose property is diminished by a payment of money wrongfully induced is injured in his property." It is good to see that the Supreme Court appreciates that overcharging by a monopoly works a definite legal wrong for which redress may be had.

Discrimination in price may also come within the ban of the law where that discrimination is put in force as part of a scheme to monopolize, as has been seen in many cases already. One more may be added, Aikens *v.* Wisconsin (195 U. S. 194). In this case the extraordinary facts appeared that a combination of newspapers, to prevent a rival paper from raising its rates, announced that they would charge similarly advanced rates to merchants who paid these advanced rates, while continuing to charge its adver-

tisers generally their regular rates. Proceedings were brought against the combination under the Wisconsin statute for criminal conspiracy. In point of constitutionality the case was taken to the Supreme Court of the United States, where the conviction was supported. Said Mr. Justice Holmes: "It would be impossible to hold that the liberty to combine to inflict mischief is among the rights which the Fourteenth Amendment was intended to preserve." With these two cases in mind one can assert confidently that legislation providing further remedies for overcharging and discrimination by the trusts would be held constitutional.

IX

Regulation—not destruction—will soon be shown to be the policy of the twentieth century. No enlightened person could wish to see the industrial progress which these great combinations have fostered set back. Rather upon economic grounds these efficient organizations should be turned to the common good. From this point of view these continual attacks by which the dissolution of particular trusts is successively attempted, have no

policy behind them that will eventually be justified, aside from that of driving the trusts into organizing in the final form of a single corporation. Perhaps for the present, when the proper method of legal regulation has not been worked out, it is necessary to visit this punishment upon those trusts which outrage public opinion. But very soon the time will come when the principal trusts will have fully reorganized as single corporations. And then the fundamental problem of legal regulation must be squarely faced. *Laissez faire* has unquestionably permitted great abuses by these industrial combinations which it encouraged. State control is therefore now indisputably necessary, however much it may be opposed by those who had their ideas fixed under the older régime.

What has been attempted in this book is to follow the course of the development of the policy of the law from the recent past into the near future. There are those who believe that the solution will come, not by such development in the common law, but by new legislation of a different sort. But let them remember that legislation which is out of touch with the existing law usually comes to naught. It is not impossible for the Legis-

lature to make legal that which has always been held by men of our race in modern times to be illegal, an unreasonable combination in restraint of trade—but it is improbable. It is not impossible that the Executive may be given a power to dispense with law in favor of good trusts—but it is almost unthinkable. This dispensing power to those who are good, as a rebuke to those who are thought to be bad, is not, to a lawyer, a practicable substitute for general regulation of all trusts, good and bad. Under proper regulation the trusts which are found to be acting reasonably will not be disturbed, while those which are acting unreasonably will be summarily dealt with. If the common law is as well developed as the writer believes, no new substantive law is needed. But Congress may well provide better methods for its enforcement, such as the Interstate Trade Commission which has been proposed recently.

Let it not be said that the administration has too great powers, which it is likely to abuse. There is proof enough that it is a workable programme in the fact that the successive administrations, with full authority from the Supreme Court in that early dictum to cause punishment to be imposed upon

almost any large corporation in the land, have never invoked the statute against any combination which was not beyond question an illegal combination by the common law distinction which the court has now adopted. The time has come for the recognition of the permanence of these great aggregations of capital as such. It would be a grave mistake, from an economic point of view, to force the dissolution of the corporate organizations which, without abusing their power, now control many industries. It may even be hoped that the time will soon come when it may be seen that these effective concerns may work for the common good. It is high time that the old policy directed to the impossible end of destroying the trust should make way for the new idea to regulate the business conduct of these great industries. Regulation—not destruction—should be the programme of the future.

It has indeed been a long campaign which the law has been waging against the trusts. And it has been conducted with varying fortunes. It is a matter of flow and flux, as is the nature of progress. We think we know the limits of the application of the law to-day in reading this latest decision. But, if the

history of this matter is to teach us anything, it is that one never can be sure of the future. However, all that enterprising men want is reasonable certainty to go ahead on; and this they have in the decisions of this year. He who is not willing to risk his fortunes upon fair probabilities has no place in the higher realms of American business. Peace we may have for a time with these latest decisions in evidence. But it is an armed peace without immediate prospect of final disarmament. For this present century at least there can be no long respite from social warfare, *bellum omnium contra omnes.*

X

It is very likely that the problems which have been discussed in this chapter will receive greater attention in the immediate future than they have hitherto. Unquestionably we are going to have law enough to redress the wrongs done others in business by the monopolistic concerns. It should be the abuse—not the possession—of monopoly which will subject a concern to prosecution under the law in the future. The essence of the wrong of monopolization is the exclusion of others from the market, not mere growth of the concern

itself. In other words, it is unnatural growth by unreasonable tactics which will be punished, not natural growth by deserved success. Monopolization by exclusive policies and unjustifiable discriminations is the thing to be prevented. With an open market a rival concern may succeed on its merits, but not if the trusts are allowed to control the market. If this opportunity is preserved, there will be almost protection enough against any injury to the public, if not by competition itself, by the potentiality of competition. If unfair competition is forbidden, fair competition will always be possible. The market should be so free from unnatural restraints that by natural competition one may always succeed.

NOTE

For other examples of suits brought under the Federal anti-trust statutes by a competitor injured by the force of the monopoly, see—Rice *v.* Standard Oil Co., 134 Fed. 464 (1905); Loder *v.* Jayne, 142 Fed. 1010 (1906).

The decisions under the State anti-trust laws are to the same effect, see—Finck *v.* Schneider Granite Co., 187 Mo. 244 (1904); Straus *v.* Am. Publishers' Ass'n, 177 N. Y. 473 (1904).

CHAPTER XII

EXTENT OF STATE CONTROL

I

ALL businesses affected with a public interest are subject to State control in a peculiar degree. Whether a business is public or not depends in last analysis upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so, there will be virtual competition; if not, there will be virtual monopoly. It will be found that in many of the great businesses such competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in these industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners. They are affected with a public interest, since

these agencies are carried on in a manner to make them of public consequence. Having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Plainly we have in the accepted use of these phrases the manifestation of a deep-seated change in habits of thought. Only twenty-five years ago the general feeling as to every sort of industrial relation was that it was better to leave all alone, that it was better to leave people to work out their own salvation. But of late years we have been calling upon the State to save us from monopoly in all its forms; and we are impatient if it delays.

II

In recent times there undoubtedly is an increasing need of this stricter regulation of all employments which appear to be affected with a public interest. The most of men appreciate that the law has already taken control of the situation for all time. It is hardly too much to say that the efficient regulation

of the monopolistic concerns by sufficient law is the most pressing problem confronting this nation. Great power brings as its consequence the need of control of that power for the good of the whole people. It is urged that the time has come when extension of the law and enforcement of it should be the avowed attitude of all conservative persons who wish the perpetuation of present conditions.

It would be well if the restless and the doubting who see many abuses and many wrongs in the conduct of the great monopolies without prompt remedy or adequate redress, might be relieved and heartened by being shown that the common law is adequate to deal with all real industrial wrongs, and that with the aid of remedial statutes the administration of the law can be relied upon. The proprietors of these great businesses should be told sharply that they may not adopt to the prejudice of their public various profitable policies, and then justify them as inherent rights which other men in ordinary business may use in the advancement of their interests.

All businesses both great and small are subject, to be sure, to that general police power of the State whereby in any civilized society

the effort is made to so order things that one may not use his own so as to injure another. But the comparison of the large amount of regulation which it is considered proper for the State to impose upon a monopolized business with the small amount of regulation which it is considered proper for the State to enforce in regard to competitive business is in itself significant enough. The difference which is shown is more than one of degree; it becomes one in kind. In the ordinary business where regulation by competition is still sufficient, the law cannot question the decision of the proprietor to refuse to sell to a particular applicant, or to discriminate in his prices. But where the business is in the hands of a monopolistic combination, refusal to sell may become conspiracy, and discrimination may be held illegal.

III

There is now fortunately almost general assent to State control of the established monopolies. Two ways only can be found to exercise such control. One way is government ownership. The other way is the control of their practices. One or the other of these methods must be finally adopted. The

conservative method is now on trial. It behooves us to see to it that it be so intelligently tried, and that the law applicable to the case be so accurately enforced, that we may not be driven perforce to the radical alternative of public ownership. If government ownership should be made necessary by the failure of State regulation, we should be face to face with socialism. For that a people once accustomed to seeing all great business operated by the government would be stopped by any legal distinction between them and ordinary concerns, is too much to hope.

This principle of State control does not lead one to socialism; indeed, it saves one from socialism if truly understood. It is only in those few businesses where the conditions are monopolistic that dangerous power over their public has been attained by those who have the control. In most businesses the virtual competition which prevails puts the distributors at the mercy of their public. In current opinion the recognition of this distinction is manifest. Men are as eager for an open market as ever; but they wish the control of monopoly to insure it. The demand is for freer trade where competition prevails and stricter regulations where monopoly is found.

So long as virtual competition prevails there is no necessity for coercive law, since there is then no power over the purchasing public. But where in any business virtual monopoly is permanently established the people will not be denied in their deliberate policy of effectual regulation of such public service for the common good.

Only to this extent the individualistic ideal of society gives place to the collective policy. It is with true appreciation of the real issue that we are contending for State control to gain individual liberty. It may once have been the ideal of industrial freedom that a man might do as he pleased with his own; in any event that is no longer our notion of social justice. It is believed now that with increase in power over the particular market comes increase in responsibility to the dependent public. Socialism would destroy all private interests in the name of the public; regulation would preserve private interests by reconciling them with public right. Socialism attacks all capital to whatever business it is devoted; regulation grapples monopoly only when it is convinced that there is no other way to safeguard the interests of the public.

IV

It seems to the writer that these occasional decisions, in recent years, by which the dissolution of some one great corporation is attempted in turn, are as futile as the anarchist's bomb, and that the programme of destruction of these established monopolies is as unintelligent as the terrorist propaganda. No thinking person, for example, would wish to see the American steel industry revert to scattered forges. This is especially true, as it is quite probable that what evils there may be in the conduct of the present company could be met by effective regulation of its dealings of the sort to which monopolies have been subjected from time immemorial. No one proposes to abolish gas companies because they usually have a monopoly; but everyone agrees that such companies should be compelled to serve all that apply with adequate facilities for reasonable compensation and without discrimination. And this law is always ready to include new businesses within its scope, as it did unhesitatingly in the case of the electric companies, for example.

It is not pretended that all that is urged in this book should be taken as established in

the present law. It is put forth seriously by one somewhat versed in the whole subject as a working hypothesis, that the solution of the trust problem may be found in the law governing the public callings. It is contended that the operations of the greatest of these trusts have become of such public consequence as to affect them with a public interest within the meaning of the law. Moreover, these trusts have, in their control of their respective markets, an assured permanence from the conditions prevailing, so that they are not to be dispersed as those trade combinations which are aiming at temporary cornering of the market may be. These great industrial organizations should not be swept away by dissolution of these new corporations. It is rather to be desired upon social grounds that these effective producers in their special fields should be turned to the common advantage. A sufficient regulation to secure this general good, it is submitted, is to be found in the law governing public employment, which requires, with elaborate detail for the enforcement of the general principles, that those who conduct a business in which the public has an interest serve without discrimination and for reasonable compensation. If this law of pub-

lic employment could be enforced against the industrial trusts, a solution, it may be hoped, would be found for the trust problem; for it would reach the two complaints most seriously made against the trusts—their predatory competition and their excessive capitalization.

The impartial enforcement of this programme ought to accommodate all the conflicting interests involved in this issue. The legality of these corporations in point of organization being fully recognized, the present danger from a sudden attack by legal proceedings which may eventuate in the dissolution of the corporation would no longer exist. On the other hand, with the prohibition of discriminatory prices effectively enforced by the administration, enough competition would be preserved to modify the monopoly so that the right of the State to regulate prices need seldom be resorted to. This solution would result in an industrial peace, with the continual attacks upon the monopolistic corporations generally abandoned and the right of the public, for example, to prevent the unfair tactics of that corporation fully recognized. Regulation even to this extent is already sufficiently suc-

cessful in dealing with those corporations now held to be in public service by reason of their virtual monopoly, while under modern conditions the attempt at permanent suppression of industrial concentration in certain businesses is really hopeless. The present policy of destruction should be abandoned in favor of the programme of regulation. The law for regulating the trusts is already developed, if only we have the insight to realize it.

THE END

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